STATE OF INDIANA)
) SS:
COUNTY OF DELAWARE)

IN THE DELAWARE COUNTY SUPERIOR COURT

CRAIG DUNN and PHILIP WILEY,)
et al.,)
Plaintiffs,)
)
-v-) CAUSE NO.
) 18D01-9305-CT-06
RJR NABISCO HOLDINGS)
CORPORATIONS, et al.,)
Defendants.)

VOLUME 8
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P.M. Session

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(Jury not present)
THE COURT: Thank you, be seated.
Good morning, gentlemen.

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ALL: Good morning.
THE COURT: Plaintiffs' counsel are present. All defendants represented this morning?
MR. OHLEMEYER: Yes, sir.
THE COURT: For the record, jury is not present. We have an issue regarding submission of some documentary evidence regarding Dr. Burns' testimony. Who is going to handle that for the plaintiff?
MR. WESTBROOK: Your Honor, Ed Westbrook for the plaintiffs. We have a group of documents that we would like to argue this morning. If there are no objections, move them into evidence. If there are objections, argue those, because we do intend to put those documents into evidence regardless of whether they're used with Dr. Burns. So I think the question is can we get them into evidence. If we can get them into evidence, then the subsequent question is can Dr. Burns comment on them.

So we would like to address the admissibility question.
THE COURT: Last night, if I understood Mr. Motley, the proposal, as I understood it, was that these would be offered in terms of Dr. Burns' expert opinion. Is that the purpose of the offer today?
MR. WESTBROOK: Your Honor, the purpose of the offer today is to move them into evidence in their entirety. Some of the documents Dr. Burns may rely on for his testimony. But the admissibility of these documents is not dependent on Dr. Burns.
THE COURT: I may have misunderstood Mr. Motley, then, last evening.
MR. WESTBROOK: I don't think it's a misunderstanding. It's a matter of which comes first. I think the documents are admissible independently, and then Dr. Burns will likely rely and comment on some of those and those will likely become apparent as we discuss them, Your Honor, to --
THE COURT: They are offered as

substantive evidence, not as evidence just in aid of his opinion?
MR. WESTBROOK: That's correct, Your Honor.
THE COURT: All right.
MR. WESTBROOK: Your Honor, to move this along, I've tried to group the documents so we can avoid a one-by-one march and see if it helps or doesn't help. I'm not sure it will.
THE COURT: All right.
MR. WESTBROOK: Your Honor, the first three documents I would like to talk about in order are Exhibit 25028, 7129, and

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943. And Your Honor, I'll hand them up to you so that you have a copy while we discuss them.

And, Your Honor, what those are, just in outline, 25028 is a Tobacco Institute 1979 Counter-Surgeon General's Report. A report that the Institute got prepared and argue to steal the thunder from the Surgeon General's 1979 report. That's what the first document is.

The second document, 7129, is a Tobacco

Institute memo a few weeks later discussing how they prepared the Counter-Surgeon General's report and what success they had in stealing the Surgeon General's thunder.

The third document, 943, is a BATCO document several months thereafter in September of '79, giving BATCO's comments both on the Surgeon General's report and on TI's Counter-Surgeon General's Report.

So that's why the three documents are grouped together. We have the Counter-Surgeon General's Report, the TI memo discussing why they prepared it and how they got it disseminated, and BATCO's comments on both the Surgeon General's Report and the Counter-Surgeon General's Report. And we'd move those three documents into evidence, Your Honor.

THE COURT: Mr. Ohlemeyer, let me ask you, first of all, have you had an opportunity to review all the documents offered by plaintiff?

MR. OHLEMEYER: Yes, I have, Your Honor.

THE COURT: All right. Are there

documents against which there is no objection?

MR. OHLEMEYER: There may be a couple but there aren't many.

THE COURT: All right.

MR. MOTLEY: Gee, I'm surprised.

THE COURT: First three, Mr. Ohlemeyer?

MR. OHLEMEYER: First of all, Your Honor, I'm not sure who they're offered against, so...

THE COURT: Good point.

MR. WESTBROOK: Your Honor, the Tobacco Institute Counter-Surgeon General's report is offered against the Tobacco Institute and its members as we did with the other Tobacco Institute documents. That is document 25028.

The second document, the Tobacco Institute memorandum on how they prepared the Counter-Surgeon General's Report and the success they had is similarly offered against the Tobacco Institute and its members.

And the third document, the BATCO

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comments on the Counter-Surgeon General's Report, is offered against BAT and Brown & Williamson.

MR. SHOCKLEY: Mr. Westbrook, who are the members in '79 and TI you maintain it's admissible against?

MR. WESTBROOK: 1979, Your Honor, according to the defendants' responses, the members of the Tobacco Institute, Brown & Williamson Industries, Brown & Williamson Tobacco, Liggett & Myers, Lorillard, Philip Morris, RJ Reynolds Industries, RJ Reynolds Tobacco.

MR. OHLEMEYER: Your Honor, with respect to 25028, this so-called Counter-Surgeon General's Report, there may have been such a report, and it may have been distributed, but there is no evidence that this is it. I mean, this is -- you know, look at it. It could be a draft of that, it could be the first draft, it could be the last draft, it could be anything in between. But 7129 does not identify this as such a report, and it doesn't indicate that this, 25028, was actually distributed to

anyone.

With respect to 7129, there is no foundation to establish who Mr. Frankovic is, whether anyone agrees with anything he said or whether any of this is accurate or inaccurate, or whether it was the result of conduct on the part of one or more of the parties in this case.

And with respect to 943, Your Honor, we have somebody that's -- the title is "Some Comments." Somebody's comments on the '79 Surgeon General's Report. There is no indication who this was shared with, who this was shared by, or who this was communicated to.

So for all those reasons, Your Honor, I don't think there is a foundation established to admit these or to establish relevance to this case, and to admit them would cause confusion or prejudice which outweighs the probative value.

THE COURT: On the last it says author P.N. Lee, but your comment is we don't know who P.N. Lee is.

MR. TRINGALI: Your Honor, may I

just be heard separately with regard to the last document, 943?

THE COURT: 943, sure.

MR. TRINGALI: One of the defendants they want to introduce it against is BAT Industries. Mr. Westbrook has represented that the document is from British American Tobacco Company, which is a subsidiary. It is not the parent company, BAT Industries. The document, I don't think

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that Mr. Westbrook would deny this, is neither written by nor sent to, nor found in the files of BAT Industries. And there is no basis, just because we're the parent company, under the law, to introduce that document against us. Thank you.

MR. OHLEMEYER: Or anyone else, for that matter.

THE COURT: Mr. Wagner.

MR. WAGNER: To supplement Mr. Ohlemeyer's objections to 943, if I may, I'd also like to object to 943 on these grounds.

First of all, it's irrelevant and contains much irrelevant material such as

children of parents who smoke, heart problems, it's replete with double hearsay, Your Honor, and it's extremely prejudicial, and I know what the plaintiffs want to do with this.

If you'd look at page 6, for example -- these pages are not numbered. If you go to page 6, you see there in 3.2 subparagraph b a double hearsay statement, a reference to a Julian Peto about saving the country money by increasing the number of people dying soon after retirement as a reference to the document, the Surgeon General's Report, about costing the nation so much money and so forth.

So we've got not only hearsay here, but we've got double and triple hearsay throughout this document. And it's going to be very prejudicial to the defendants if this is admitted.

Also on page 14, Your Honor, there is a reference to youth smoking, which is a subject of Your Honor's motion in limine which was granted before trial, and that subject is excluded from the trial.

It also, second page from the end, Your Honor, contains references to documents that are not before the jury and it's going to be very confusing. We don't know who the author is. We don't know what was done with this document, we don't know who it was given to, and the jury is going to speculate about this document and its intentions and what was done with it, and I think for all those reasons it is further objectionable and should not be admitted.

MR. WESTBROOK: Your Honor, would you like me to respond to some or all of those?

THE COURT: Take the first one, what you call a Counter-Surgeon General Report.

MR. WESTBROOK: Yes, Your Honor. First of all, with respect to whether it's a draft of whose document it is, if Your Honor would turn into the fourth page of the

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document, you will see that it is not a draft. It's signed by the president of the Tobacco Institute. Your Honor, it is their document. On the first page it bears the

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stamped typed logo, "The Tobacco Institute." It is a defendant's document in this case. It was produced to us by one of the Tobacco Institute members, of Philip Morris.

As to the redactions, Your Honor, if there is something within the document that refers to children or something that they want specifically redacted, we don't have a problem with taking that out of the document. But there is no question that this is an authentic document, Your Honor. There has been no challenge to authenticity of the document. It's a business record and it's a signed copy of the document.

Also, Your Honor, the document also is consistent with the next memorandum, that is the Tobacco Institute January 25 memorandum which was issued just two weeks after the January 10th document. And that's where they report to their members on the activities that they undertook in issuing this document.

And you'll notice on the second page of Exhibit 7129, they've specifically referenced our report, "Smoking and Health

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1964 to 1979, The Continuing Controversy." That is exactly the title of 25028, the major report. And they talk about exactly how they put it together. There couldn't be a more specific road map as to how this document was created than what it is than Exhibit 7129, 425028.

THE COURT: Talk about the third document, 943.

MR. WESTBROOK: The third document, 943, was produced to us by BATCO, and that document is internally consistent as to time. It comes several months after the report was issued, and Your Honor will notice that back on page 17, the author discusses the Tobacco Institute report, The Continuing Controversy, and goes through it and discusses that specific report.

As to the issue, Your Honor, of BATCO and BAT, Your Honor did address that in connection with some other documents, and I have some further information that I think, hopefully, will clear up BATCO issues and move these BAT things along which will put the relationship, I believe, Your Honor, of

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BAT, BATCO and B&W hopefully to rest.

If I may, Your Honor, I have a notebook of exhibits with a short outline and improved diagram, and a copy for the defendants as well.

Your Honor, if I could take a minute,

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because I think through the rest of the case when this issue comes up about BATCO documents, to discuss why it is that BATCO documents are admissible against both BAT and B&W.

THE COURT: Go ahead.

MR. WESTBROOK: Basically, Your Honor, the documents that I have attached to the short outline indicate that BAT, I believe as Mr. Motley calls them, Big BAT, delegated worldwide tobacco issue coordination to BATCO, and that is in attachment one, Your Honor, which is a BAT annual report.

The document states -- this is a BAT report saying that British American Tobacco Company, Limited, that's BATCO, is responsible for the group's tobacco interests in 48 countries with principal

subsidiaries in the U.K., Europe, Latin America, the Caribbean, Asia and Africa. It also coordinates key strategies for all group tobacco companies, including those in the U.S.A.

That's Brown & Williamson, Your Honor. So BAT, Big BAT, gives BATCO the responsibility for coordinating all those responsibilities. BATCO accepts those responsibilities.

Attachment 2, Your Honor, is BATCO's chairman's advisory conference. And on page 4 of that document, BATCO now -- this is the company that generates the document -- says the meeting, that is, the chairman's meeting of BATCO, endorsed the responsibility delegated by BAT, Big BAT, to BATCO to develop, agree, and coordinate the key strategies for its tobacco activities and agreed the exchange of information necessary to achieve this.

So the parent says BATCO, you take care of the tobacco matters for everybody, including the U.S. company; BATCO says we'll do it. We go on, Your Honor, and we see

that BAT did do it.

The third document, which is a 1989 BATCO document, indicates it is certainly doing it. Paragraph 4. In addition to its direct role in the management and development of its own business, BATCO will also be responsible through the tobacco strategy review team.

They've set up a team now for formulating and agreeing with the other tobacco companies, that includes Brown & Williamson, a group-wide R & D program for the preparation of compendiums on smoking issues and for initiating and coordinating meetings and other activities to promote the group's views on these issues. So they're actively doing it.

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The next document, attachment 4, is another document that states the same thing. The American Tobacco Companies recognized that BATCO was representing B&W.

Attachment 5, Your Honor, which is a BATCO document written to Philip Morris. It says to Philip Morris: Two of your competitors are represented on TRC, that's

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the English Tobacco Research Committees; American Brand by Gallahers, and B&W by ourselves. BATCO is telling Philip Morris we are representing B&W in tobacco matters.

So not only have they told the parent they accept the responsibility; not only are they doing it, they tell the rest of the industry that they're representing B&W on tobacco matters. They actually do it. We know they did it. We know they met with B&W. We know they cooperated with B&W on joint research.

Attachment 6 tells us that, Your Honor. That's another BATCO document. The first paragraph says that they're working on a project with different aspects of the work being done in South Hamilton, that's BATCO; Hamburg, that's their German company; and Louisville, that's Brown & Williamson in Louisville, Kentucky. The development follows a meeting in South Hamilton in September involving representatives from all three centers. B&W people come to South Hamilton, meet with the BATCO people, they're exchanging information.

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It's an ongoing constant relationship as we see in Exhibit 7, Your Honor, which is attached on page 8. They're talking their need to cooperate, Your Honor, on environmental tobacco smoke.

Paragraph 18 on page 8 says, In view of the fast growing importance of environmental smoke, it was agreed there should be close communication on research between GR in D.C., that's BATCO, B&W, Brown & Williamson, Canada and Germany, with regular meetings of experts at not more than six-month intervals.

This is a document, Your Honor, which is a BATCO document but you'll notice it was produced by B&W. They had it. They knew it.

And finally, Your Honor, Attachment 8, we not only know that everybody knew they were doing it, we know that they actually did it. The B&W people attended the BATCO-sponsored planning meetings which in the English parlance they call structured creativity conferences. Attachment 8 is one of those.

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Background. First page says this conference was to bring together key

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marketing and product application thinkers to stimulate innovative ideas.

The third page has the list of participants, Ted Para, Brown & Williamson; Mike Scott from BAT; and other members from BATCO.

So, Your Honor, that is an explanation of the chart that's on the left showing that BATCO was in the center. It had the responsibility from the parent. It was coordinating constantly with B&W. It was the agent for B&W on tobacco research matters.

It's for that reason, Your Honor, that we have maintained and do maintain that the BATCO documents are admissible against both the parent and against its sister for whom it was given responsibility of representation on tobacco matters and for whom it was responsible to coordinate the research with B&W.

That's a long way, Your Honor, of discussing why 943 is admissible, but I hope

it sets the stage for the rest of the BATCO documents throughout this trial.

MR. OHLEMEYER: If I may, Your Honor, that's a very eloquent jury argument, but they could have established any or all of that, and I don't know that any of it is true or I agree with any of it. They could have taken 36(b) depositions, they could have served requests for admissions, they could have established through evidence everything they just argued.

Every morning they come in here and they argue to you instead of proving evidentiary foundation. And it's all foundation that may or may not exist.

We spent six years getting this case ready for trial. They could have sued BATCO. They could have asked people to authenticate these documents, they could have asked people to explain it. They could have asked people who communicated these thoughts, who received these thoughts, who acted upon these thoughts. They haven't done any of that. They come in here every morning and make a jury argument and say

admit this stuff.

MR. WESTBROOK: Excuse me, Your Honor. That's not jury argument. I attached the exhibits for everything said and I'll stand by everything said. It's in the documents. It's not my argument.

MR. TRINGALI: If I might respond on behalf of BAT Industries. I think the problem here is that they have not sued BATCO. If they had British American Tobacco Company here as a defendant as they have in most of their cases, then they wouldn't have this issue of trying to find someone to pin

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the British American Tobacco Company documents on so they can get them into evidence. That's what's going on here. They make this argument about BAT Industries delegating everything and, therefore, these are all their documents.

The fact of the matter is, Your Honor, you haven't heard Mr. Westbrook make any contrary assertions. None of these documents are written by, sent to, or found in the files of BAT Industries. The only hook he has for BAT is that it's the parent

company and he says because it's the parent company and because, as the parent company, one of its companies is coordinating activities for the other companies, then every document in its files is admissible against the parent. But that isn't the law.

You don't admit documents that are found in the files of a subsidiary against the parent. The issue here is that they have not named the person whose documents they want as a defendant, and they're trying to find a hook to get those documents in, and they've now come up with this argument that because there's a parent/subsidiary relationship that any document, even though they haven't shown that the document was in any way communicated to the parent, becomes the admission of the parent. And that's not the law, Your Honor.

THE COURT: All right. You have another group prepared, Counselor?

MR. WESTBROOK: Yes, Your Honor.

THE COURT: For the record, 25028 will be admitted. 7129 will also be admitted. 943 will not be admitted at this

time.

(Plaintiffs' Exhibit(s) 25028, 7129 received in evidence.)

(Plaintiffs' Exhibit(s) 943 not received in evidence.)

THE COURT: Go ahead, Mr. Westbrook.

MR. WESTBROOK: Thank you, Your Honor. Next we have 9338 and 20461.

THE COURT: Did you say 9338?

MR. WESTBROOK: Yes, Your Honor.

THE COURT: What's the purpose of 9338?

MR. WESTBROOK: Your Honor, 9338 is a document produced by Brown & Williamson, a research conference, and on page 6, Your Honor, they discuss the position -- their position with respect to environmental and ambient sidestream smoke.

THE COURT: This is offered as to whom?

MR. WESTBROOK: This is offered as to BAT and as to Brown & Williamson. And this is the document that on page 8

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discusses the fact that BATCO was going to

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have close coordination with Brown & Williamson on environmental tobacco smoke issues.

And, Your Honor, the reason I've offered it with 20461 is 20461 is an environmental smoke memorandum by C.I. Ayres, and in the research conference memo, 9338, Your Honor, they discuss that very document. And on page 7, paragraph 17, they say the personal paper by Dr. Ian Ayres was regarded as a useful contribution and that it highlighted our need for better knowledge and understanding of the key chemical and biological aspects of environmental tobacco smoke.

THE COURT: This is also offered as to BAT and B&W?

MR. WESTBROOK: Yes, Your Honor, so these two documents are internally consistent. One refers to the other. They both refer to environmental tobacco smoke.

THE COURT: Mr. Ohlemeyer?

MR. OHLEMEYER: May I see a copy of the document in the form that they're offering it?

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MR. WESTBROOK: Sure.

MR. OHLEMEYER: This one?

MR. WESTBROOK: Yes.

MR. TRINGALI: While Mr. Ohlemeyer is looking at the document with regard to BAT Industries, it's the same argument.

THE COURT: Same argument?

MR. TRINGALI: Yes.

THE COURT: That would be to 20461.

MR. TRINGALI: It's an internal document to British American Tobacco Company not sent to, found in the files of BAT Industries.

MR. MOTLEY: Your Honor, may I add one thing to the record. I know Mr. -- we learned yesterday that there was some event that occurred in the state of Minnesota case with respect to BAT documents. I don't have the details of it yet, but I think it bears on this very issue that we're addressing this morning, 69 new documents were disgorged in some fashion.

You may or may not know, BAT Industries, in fact, was sued. There were a bunch of depositions taken in England and

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that sort of thing, and at some point in time, once we figure out exactly what did happen yesterday, my information is from the Internet, we may ask Your Honor to revisit. If it makes no difference, we won't.

THE COURT: I may revisit this but 20461, the same rule would apply, same order. I will not admit.

(Plaintiffs' Exhibit(s) 20461 not

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received in evidence.)
THE COURT: Any objection to 9338, Mr. Ohlemeyer?
MR. OHLEMEYER: Yes, Your Honor, for the reasons stated before, there is no foundation established that this was communicated to anyone at Brown & Williamson at any point in time that's relevant to the lawsuit, and that it was acted upon or agreed to or discussed or in any other way connected to the conduct of the company as it relates to the issues to be tried in this case. So I'd object to it for lack of foundation, lack of relevance, and under 403 its probative value is outweighed by its confusing and time-consuming fact.

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MR. TRINGALI: On 9338, if I may, Your Honor, I believe they're also trying to introduce it against BAT Industries. It's the same argument. It's not a BAT Industries document. It's not in their files.
THE COURT: 9338, the Court is persuaded should be admitted.
(Plaintiffs' Exhibit(s) 9338 received in evidence.)
THE COURT: What's the next group Counselor?
MR. WESTBROOK: Fortunately I had been flipping by some that have previously been admitted in the notebook.
The next document, Your Honor, is 9645.
THE COURT: This is offered as to whom?
MR. WESTBROOK: This document is offered as to Philip Morris, Your Honor. I've got another copy of it here, Your Honor. It's a 1968 memorandum produced by Philip Morris involving a research meeting of Philip Morris officials on smoking and health and how they're going to approach the

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issue of whether they'll continue their policy of vigorous denials, whether they need to do something else when they're dealing with these issues, especially now that as the federal government is becoming more active on it.
MR. OHLEMEYER: Your Honor, it's not on letterhead. It is written by one individual at Philip Morris to another individual at Philip Morris. It's entitled "Some Thoughts." There is no evidentiary foundation that these are the thoughts of the company, that these are the actions of the company, or that these were communicated to anyone within or beyond the company. So I think it lacks foundation to establish its relevance to this case. And under Rule 403, even if you found it of marginal relevance, it should be excluded because its probative value is far outweighed by its ability to

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confuse and mislead the jury.
MR. WESTBROOK: Your Honor, it's signed by their research director on the last page. It reports on a Hilton Head meeting they had of the company.

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THE COURT: How do I know that's a research director?
MR. OHLEMEYER: He is. There's no doubt about that, Your Honor. But my point is, this is a document that says some thoughts. The title says "Some Thoughts." These are his thoughts. And at this point, there is no way to know whether his thoughts were shared by the company. Mr. Goldsmith might have written them a memo back that said you're all wet. That's the kind of evidentiary foundation that's necessary to establish the relevance of the issues in this case.
MR. WESTBROOK: At most that goes to the weight. And the title isn't "Some Thoughts." The title begins "Hilton Head Meeting of the Cigarette Company Research Directors."
THE COURT: I think that does go to the weight. 9645 will be admitted.
(Plaintiffs' Exhibit(s) 9645 received in evidence.)
MR. WESTBROOK: Next, Your Honor, is 10513. Hopefully it will be next in

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order in your notebook. Another Philip Morris document also produced by Philip Morris from a research -- a scientist and researcher to the research director. Mr. Wakeham wrote another document concerning tobacco matters. Also discusses the issue which has been brought up in this case about how asbestos or radioactivity may interact with smoking.
THE COURT: Mr. Ohlemeyer?
MR. OHLEMEYER: First paragraph says, Your Honor, all the suggestions which are written as titles of proposed studies seem to be relevant to cancer research. I will assume I know what Summers has in mind and that I know the attitude of the tobacco working group. With these assumptions, I'll try to make some constructive comments.
I don't see how this has any relevance or probative value in this case. For all the same reasons on the last document, Your Honor, I would object to its admissibility.
MR. WESTBROOK: The paragraph on epidemiology states: Aside from the well-known -- occupational synergy is

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suggested. That is, synergy being the interaction of two proposed carcinogens working together. He continues: Aside from the well-known ones of asbestos, radioactive dusts and gases, Summers believes others

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should be looked for retrospectively. It shows in 1973 that Philip Morris was aware of the synergy between asbestos, radioactivity, and other carcinogens.

THE COURT: 10513 will be admitted.

(Plaintiffs' Exhibit(s) 10513 received in evidence.)

MR. WESTBROOK: Next, Your Honor, is 12879, a trip report dated 1979 produced by Philip Morris. Reports on a meeting that Dr. Osdene, who Your Honor has heard a lot about, with a German tobacco scientist discussing smoking and health problems.

MR. OHLEMEYER: In Germany, Your Honor.

MR. WESTBROOK: There's no difference, where they're discussing smoking and health problems.

MR. OHLEMEYER: I think at this point in this case there hasn't been any

evidentiary foundation established that anything that went on in Germany caused or contributed to cause anything that went on in Mrs. Wiley's world. And I think we're way far afield at this point, Your Honor, and I object to it for all the reasons I've previously stated with respect to the last document.

MR. WESTBROOK: Your Honor, we're talking about where Philip Morris went and discussed tobacco and health matters with people worldwide. Philip Morris is a worldwide company. From what source they get their information is irrelevant. The fact is they got the information.

MR. WAGNER: Judge, if we're making objections, I have a couple I need to add.

THE COURT: Go ahead.

MR. WAGNER: Your Honor, this document is replete, again, with double hearsay and it's essentially, if you read through it -- and I know Your Honor hasn't had a chance to read through this, but --

MR. MOTLEY: I object to Mr. Wagner, who doesn't represent Philip

Morris, standing up here and hasn't read through a document, just like the last one he stood up here and ranted that it wasn't signed and all that. Before he stands up and makes these representations, I respectfully suggest he ought to read the document. It's not his client, number one.

THE COURT: It's offered against all Defendants.

MR. WESTBROOK: Philip Morris is, Your Honor --

MR. WAGNER: There's a reference in here to my client in the very second paragraph.

THE COURT: Go ahead.

MR. WAGNER: If you see that RJ

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Reynolds, that's why I'm making the objections, Your Honor.

THE COURT: All right.

MR. WAGNER: This document, if you even scan through it, doesn't contain admissions. What it is are opinions and commentary about apparently people who had meetings and they're now talking about what they -- their impressions were of the things

that they observed. These are not admissions, Your Honor. And they are conclusions.

And just as an example -- and this would be a very prejudicial document, the writer of this document forms the opinion, makes the comment in the second paragraph, if you just look at it, Dr. Koenig felt that RJ Reynolds, through Frank Colby, has been using ICOSI to control the various national associations and so forth.

Now, Judge, I mean, there has to be a limit as to what can be admitted here in terms of fact versus fiction, fact versus opinion, fact versus commentary.

This is not a document that contains admissions. This is a document that contains impressions, commentary by somebody about what other people think, what other people are doing and that sort of thing. It's certainly not admissible under any basis. It contains double, triple hearsay and everything else.

MR. WESTBROOK: Your Honor, first of all, the document is a Philip Morris

business record.

Second of all, the statements, whether they're true or not, are not offered for the fact that these people are saying the truth. It's offered for the fact that these people were discussing these things at the time. These are the defendants discussing these things at the time internally.

In fact, we contend many things they said were untrue, but the truth of it is not what's important in this case. The fact is that they were saying these things and thinking these things and planning these things.

MR. WAGNER: All documents are admitted for -- if they're hearsay documents, they have to come in, Your Honor, as an exception to the hearsay rule. If they come in as an exception to the hearsay rule, they're coming in for the truth of the matter asserted in them. They have to have relevancy, have to have basis, have to have something in them that makes them an admission, not some commentary, not some reference to what somebody else said about

somebody else about somebody else, Your

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Honor. Just because it's a Philip Morris document doesn't make it admissible.

THE COURT: In my mind, at least at this point, the prejudicial nature of the document outweighs any probative value. 12879 will not be admitted.

(Plaintiffs' Exhibit(s) 12879 not received in evidence.)

MR. WESTBROOK: Next, Your Honor, is 12894.

THE COURT: Counselor, how many more numbers are there, do you know?

MR. WESTBROOK: I would say there appear to be about ten or so, Your Honor.

THE COURT: Ten more? Is it possible we could bring the jury in, start with your witness, and take this up later or do you need this?

MR. MOTLEY: Yes, sir. We won't need this until later on today.

THE COURT: I appreciate this, because I did make a promise to that jury.

MR. MOTLEY: I might make an observation, Judge, that we've been sitting

here and I have yet to hear one of these documents, just keeping score, that they don't object to.

MR. WAGNER: If you don't bring objectionable evidence in, we don't object.

MR. TRINGALI: Your Honor, may I just take one second and ask, with regard to 9338, if there would be a limiting instruction so that it not be as to BAT Industries? It's a research conference, the attendees are no one from BAT Industries, again not in their files, not sent or received by them.

THE COURT: Mr. Westbrook, you offered that as to BAT and B&W. The request is that it would only be offered to Brown & Williamson.

MR. TRINGALI: For the reasons as to each of those others documents. We weren't at the conference.

THE COURT: I think that's a fair request. Make that limiting instruction.

MR. WESTBROOK: Based on your ruling, Your Honor, yes, we'll do that.

THE COURT: Let me ask you again,

Mr. Westbrook, 10513 was offered as to whom?

MR. WESTBROOK: 10513, Your Honor, Philip Morris.

THE COURT: All right.

MR. CROSS: If the Court please.

THE COURT: Do you have a witness for us, Mr. Cross?

MR. CROSS: She is on her way over. It will be just a couple minutes.

THE COURT: Who is your first?

MR. CROSS: Mary Jane Slaughter.

THE COURT: How is the doctor

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today?
MR. MOTLEY: I just sent to find out. I will know, hopefully, in a few minutes. I know he was sick through last night. He didn't have dinner with us.
MR. CASSELL: All rise.
(Jury present)
THE COURT: Be seated. Good morning, ladies and gentlemen.
ALL: Good morning.
THE COURT: Jury appears in its entirety along with all three alternates.
Plaintiffs will call your next witness.

MR. CROSS: Your Honor, at this time the plaintiffs would call Mary Jane Slaughter to the stand.
THE COURT: All right. Raise your right hand, ma'am.
PLAINTIFFS' WITNESS, MARY JANE SLAUGHTER, SWORN
THE COURT: Have a seat right over there, would you, please. Would you tell us your name.
THE WITNESS: Mary Jane Slaughter.
THE COURT: Spell your last name, please.
THE WITNESS: S-L-A-U-G-H-T-E-R.
THE COURT: Thank you.
Mr. Cross.
MR. CROSS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. CROSS:

Q Mrs. Slaughter, where do you live?
A I live at DELETED.
Q What is your address there in DELETED?
A Our mailing address is DELETED.
Q And where is DELETED?
A It's DELETED.
Q How long have you lived at that address?

A 34 years, 35 years.
Q Were you --
A 34 1/2.
Q Were you raised in that area?
A No. I came from Pennsylvania.
Q Are you a little nervous this morning?
A I'm very nervous.
Q That's quite all right. Everyone who sits up there generally has that same experience. Just take a deep breath and we'll get through this and, hopefully, it won't be quite such an ordeal.
I want you to give your answers to these folks over here because they are the ones that need to hear what you have to say.
A Okay.
Q Where were you -- you were raised as a child in Pennsylvania?
A Yes, I was.
Q How did you come to Indiana?
A I came to Marion to go to college.
Q What college was that?

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A I went to, it was called Marion College at the time. It's Indiana Wesleyan University in Marion, Indiana.

Q And did you then graduate from high school in Pennsylvania as well?
A I graduated from high school in Pennsylvania, and I went to college about three years.
Q Did you get a degree from Marion College?
A No, I didn't get a degree. I went from there into nursing school at Methodist Hospital in Indianapolis.
Q Are you a married lady?
A Yes, I am.
Q What is your husband's name?
A Wallace Arthur, Jr.
Q And have you -- how long have you been married to him?
A It will be 36 years in June.
Q Okay. When did you go to Methodist -- that was Methodist Hospital in Indianapolis?
A That's right.
Q When did you go there for nurse's training?
A I went there in 1957, in August.
Q And is that how long the program is, three years?
A It's three years. I graduated in August of 1960.

Q And what kind of a degree or title did you have after you completed that course?
A I have a diploma from a three-year nursing school.
Q And what does that entitle you to do?
A That entitles me to take state boards and be an RN.
Q Did you take the state Boards an become an RN?
A Yes.
Q What is an RN?
A Registered nurse.
Q There was a lady that testified yesterday, Marilyn Bardsley. Do you know her?
A Yes, I went to nursing school with her.
Q At Methodist?
A Yes. We were in the same class.
Q Now, during the course of your training at Methodist, did you have occasion to -- were there any courses or any educational programs that talked about secondhand smoke or the health hazards that might be associated with it?
A No, there wasn't.
Q After you graduated in 1960, where did you

go to work?
A I went to work for a month at Marion General Hospital in Marion. And then I went out to VA and applied and got a job there.

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Q And you worked at Marion General Hospital for one month?
A Yes.
Q Did you work anywhere else before you went to -- which VA Hospital did you go to?
A At Marion.
Q Did you ever work in the Indianapolis Veteran's Administration Hospital?
A One year. I was at Marion from September of 1960 to July, the end of July 1961. And I transferred to 10th Street in Indianapolis. These two years I took some part-time classes at Marion College and then at IU downtown center while I was here in Indianapolis. And then in June of 1962 I got married and transferred back to Marion VA.
Q But your first hospital that you worked as an RN was Marion General Hospital?
A Yes.
Q And that was what year?

A 1960.
Q Was smoking permitted in the halls of Marion General Hospital?

MR. WAGNER: Objection, Your Honor. Relevancy, time, nothing to do with this case.

THE COURT: Sustained.

Q Why did you seek employment at the Marion VA Hospital if you had a job at Marion General?
A I wasn't happy at Marion General.
Q Why not?
A Because I didn't like the way I was assigned and I thought there was more security at Marion VA with insurance programs and so on.
Q Can you explain what you mean by more security?
A Well, their benefits, retirement program and insurance and so on.
Q Okay. And so you were, if I may take you through this, you were -- from 1962 to 1965 you were at Marion; is that right?
A Marion VA.
Q And just so that we're clear on this, there is another Veteran's Administration Hospital in Indianapolis, is there not?

A At the time when I was there, there was only 10th Street, although they did have a longer term care. Goodness, I can't remember exactly where it was. That was sort of part of the hospital. It was for long-term care patients.
Q But there was a complex of --
A It was Cold Springs Road. It just came into my mind.
Q So there were some -- there were hospitals or a hospital in Indianapolis that was administered by the Veteran's Administration --

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A Yes.
Q -- in addition to the one in Marion.
A Yes.
Q Okay. So from 1965 to 1973, I think you gave us a brief course on what you did. Let's -- while you were -- that 1962 to 1965 period that you were at the Marion VA initially, what kind of work did you do there?
A I was an RN.
Q And were you assigned to a specific building? What were your duties?

A I was a staff nurse on several buildings, because they would make changes in the way they ran the hospital, and for the most part I was assigned to one unit which consisted of about four different buildings. And the patients at that time were placed according to like admissions and then we would send them out from admissions to the appropriate other three buildings that they would fit into for their needs.
Q And why did you come to leave the VA in 1965?
A Because we had been in a tornado in -- Palm Sunday tornadoes, and I had a lot of traumatic stress. And the end of December there were a lot of stormy nights that whole year, and I was sort of very nervous, and I stopped working.
Q But you came back to the Veteran's Administration in the year 1973; is that right?
A Yes.
Q What did you do in those intervening years, 1965 to 1973?
A After my second son was born in September of

'66, I -- my husband was laid off or was -- the union had gone on strike, where he worked at Haynes Stellite in Kokomo, and I went back to work full-time until the strike was over, which was about the end of December. So I worked about six weeks, I suppose, on full-time. And then I went to part-time until spring of '68 when our third son was born.
Q What hospital was that?
A That was at Howard Community Hospital in Kokomo.
Q Howard County Community Hospital?
A Howard Community Hospital.
Q And that's in Kokomo?
A Yes.
Q Okay. Was there smoking permitted on the floor of --
A Yes, there was.
MR. WAGNER: Excuse me, Judge. Move the answer go out for purposes of making an objection. Irrelevant.

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THE COURT: Objection sustained. The answer will go out and the jury will disregard.

Q You started working part-time in 1968?
A Yes. Then after our son was born in, like, August, I believe it was, I went to St. Joseph Hospital in Kokomo and started working part-time there until 1973. February.
Q Let me just, in order to save the Court some time, let me just ask you this question: Up until, let's say, the late 1980 --
Let me ask you this. When did you retire from the nursing profession?
A In 1992.
Q And up until that time -- let's take it to just before that time. Let's say up until the late 1980s, at any event, were you aware of any hospital anywhere that prohibited smoking in --
MR. WAGNER: Objection, Your Honor. No foundation.
THE COURT: Sustained.
MR. MOTLEY: Your Honor, may I approach?
THE COURT: All right.
(Bench discussion)
THE COURT: Go ahead, Counselor.

MR. CROSS: Thank you, Judge.
Q Okay. You're working at St. Joseph's Hospital. Are you part-time working there?
A I worked there part-time, and I gradually increased the time I worked until I was working instead of being full-time with ten days' pay period, I was working nine.
Q And how long -- how long did that last?
A That lasted until February of 1973.
Q And you went back to the Veteran's Administration at that point in time?
A I went back to the Veteran's Administration late February of 1973.
Q And can you tell this jury why you went back to the Veteran's Administration?
MR. WAGNER: Well, Your Honor, objection. Mental processes, motivation.
MR. CROSS: Absolutely not, Your Honor. She is a factual --
THE COURT: She's already touched upon that. But go ahead generally, why did you go back.
A I went back to VA because of the oil crunch and the economy didn't look good, and I decided I was going to go back to VA because

of finances. I was afraid my husband's job would not be secure, and needed to go back to VA because of the benefits and the pay.
Q You had occasion to talk with a lot of

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nurses during your day-to-day employment activities, did you not?
A Yes.
Q And were you generally aware of the various current events, if you will, that were going on with regard to the nursing profession in those years?
A Yes.
Q And were you aware of the employment opportunities available for nurses in the year 1973?
MR. WAGNER: Excuse me. That's a yes or no answer, Judge.
THE COURT: You can answer that yes or no.
Q Let me repeat the question, Mrs. Slaughter. Were you aware, generally speaking, of the employment opportunities available for nurses in central Indiana in the year 1973?
A Yes, I was.
Q And what was the -- what was the source of

your knowledge --
MR. WAGNER: Objection.
MR. CROSS: May I finish the question?
MR. WAGNER: I'm sorry, Mr. Cross.
Q What was the source or basis of your opinion and your awareness of these matters?
A Well, it was after 1973 that -- in fact, it was in the 1980s that Medicare started cutting out benefits as far as patients in hospitals. They grouped them in diagnostic-related groups. And people who were in these -- their diagnosis fell in certain groups, they were given so many days in the hospital and then they were to be discharged in order to cut down financial output from Medicare.
And also they weren't admitted to the hospital for X-rays and diagnostic studies in a lot of cases if they could be done without them being in the hospital.
So that cut down on patient load in hospitals. And as a result, nurses were being laid off, or the older ones were put down to part-time positions, and the younger

ones were being laid off. And I had some nurses asking me, and I --
MR. WAGNER: Excuse me, Judge, hearsay.
THE COURT: We don't want you to tell us what other nurses may have told you, but I think you've generally answered his question, ma'am. Thank you.
Q So if I may paraphrase -- how would you describe the employment opportunities, the job market for nurses in the mid- to late '70s?
MR. WAGNER: Excuse me, Your Honor.

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You know, there is no foundation here. The witness just answered the last question of Mr. Cross with respect to the 1980s, a period of time not particularly relevant in terms of what we're talking about.

THE COURT: I'm not sure it's relevant, the last question. Let's move on, Mr. Cross.

Q Were you concerned about your job security in 1973?

MR. WAGNER: Objection, Your Honor, as to this witness' concern. It's not

relevant.

MR. CROSS: It absolutely is, Your Honor.

A I'm sorry I got into the wrong --

MR. CROSS: Just a minute. It goes to whether -- it goes to the basis of why Mildred Wiley went there too. She was a registered nurse just like this lady, they both went to the Veteran's Administration Hospitals.

THE COURT: Are you talking about her job security at Marion VA?

MR. CROSS: Yes.

THE COURT: If you are, you can ask her that.

A I'm sorry. I got the wrong decade. It was in the mid-'70s that Medicare did this. And I'm sure --

MR. WAGNER: Your Honor, please. The witness is volunteering. This is not -- there's no question before the witness here.

THE COURT: If she wants an opportunity to correct her last answer, she may have that.

Now, the answer that you gave regarding

nurses being laid off, did you mean that to apply to the '70s or '80s?

THE WITNESS: That's right. I was confused.

THE COURT: Which should it apply to?

THE WITNESS: It was in the '70s. About '75, '74, '75.

THE COURT: All right. Now the next question he's asked you regarding your job security at Marion VA. Were you concerned about your own job security at Marion VA?

A No. That's why I went to Marion VA. And I'm sure that's why Mrs. Wiley went there.

Q Thank you.

MR. WAGNER: Judge --

THE COURT: The last as to after she said I'm sure that's why Mrs. Wiley went there will go out. The jury will disregard that.

I'm going to tell you, ma'am, I just

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want you to answer the questions. Don't volunteer anything.

THE WITNESS: Okay.

THE COURT: Go ahead, Mr. Cross.

MR. CROSS: Thank you.

Q Would you tell this jury why you felt that going to the VA Hospital job offered you security.

MR. WAGNER: Judge, it asks for mental process of this witness and her motivation.

THE COURT: I think she's answered that, Counselor, in terms of security. Let's move on.

Q So was it 1973 or 1974 that you returned to the Veteran's Administration?

A I returned in February of 1973.

Q Where were you assigned when you returned?

A I was assigned to Building 16.

Q What kind of hospital ward or whatever was Building 16?

A It was chronic psychiatric patients and also some with some medical disabilities.

Q How long did you work in Building 16?

A I worked there from 1973 until I retired in 1992.

Q So that would have been 19 --

A 19 years.

Q Were these older patients or younger patients or a mix of both that you treated there?

A At first it was a mix of both and gradually as the patient population got more debilitated, we got more and more debilitated patients.

Q Over what time frame did this transformation occur?

A The whole 19 years.

Q And were these all veterans?

A Yes.

Q And when you say "chronic," I think you used the word "chronic patients"?

A Chronic psychiatric patients.

Q Describe for the jury, please, what your understanding of the chronic psychiatric patient was.

A I would say they are long-term psychiatric patients who didn't respond well enough to leave the hospital with medication.

Q Were these people basically permanently institutionalized as a result of their condition?

A It always sort of appeared that way, but our

goal was to get them back to the community if we could.

Q And what degree of success did you have generally speaking?

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A There were some who we managed to discharge. A lot of them would go to other facilities, like nursing homes. Or some of them might even -- early on they used to have like a community residence program where patients could go live in the community, like group homes. But it was set up with individuals who owned their home and would sort of room and board these patients.

Q Can you describe for the jury generally what you did, what your duties were, the positions you occupied during the 19 years you worked in Building 16.

A When I first went there, I worked on evening shift. I was the only RN on evening shift. And I had nursing assistants. There was three floors. The first few months they were remodeling the first floor, so we sort of had more patients on up on the other wards. We sort of moved them together. And then after a few months we had all three

floors occupied by these patients. And I was in charge of all three floors and did the RN duties and supervised the nursing assistants.

And at that time I also supervised four other wards where there was an LPN who did the medications and so on.

Q And did those duties change over the years?

A Gradually they changed. They reduced the patient load, and so it ended up that I was -- well, I don't think they completely got back to just Building 16 while I was evenings, because I changed and went on days for a couple of years because my husband had to -- well, I worked evening shift for about five and a half -- it was about five and a half years when he was laid off at Stellite in Kokomo. And he was off for six months. And then he got a job at Chrysler Transmission Plant. And after working one week he had to go on evening shift, which I was on.

And in order to take care of our boys at home, I went to day shift, and I was on day shift and did all the midnight relief

for the nurse that would be off who was doing the midnight duties. And I would take her days off. So I worked day shift three days a week and was on nights two days a week for two years. And then I went on night shift full-time.

Q What approximate year was this?

A That would have been apparently about '81, I believe.

Q Okay. And then what happened?

A Then I went on full-time night shift I think for about two years with the night relief again. And then I went on full-time nights

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again for the rest of my employment.
Q When did you first meet Mildred Wiley?
A When she came to work at VA, I believe it was the summer of 1993.
Q 1993?
A I believe so.
Q Think hard. 1993?
A I'm sorry. No. It was in 1973.
Q That was just a few months after you started there?
A Yes.
Q This was in -- she worked in Building 16,

did she not?
A That's right.
Q And you were still working in Building 16 at the time of her death, were you not?
A Yes, I was.
Q So you were there before and after her?
A Yes.
Q The entire time she was there?
A Yes.
Q Can you tell this jury what you observed personally about the practice of people smoking in Building 16 during that time period.
A The patients were allowed to smoke and employees both. The patients who could not manage their own cigarettes, the ones who smoked, which was almost all of them, were given cigarettes by the staff that had been purchased for them and stored on the ward about every two hours. Sometimes we had to hold their cigarettes for them. We always had to light their cigarettes.
Q Why was that?
A Because they weren't allowed to carry matches.

Q So the nurses carried matches?
A Yes. Or we had them in -- available there where we kept the cigarettes where we would get them for them.
Q Were there -- you kept the cigarettes in the ward?
A Yes. We stored them in the ward in what we call the canteen. It was cabinets that we locked their cigarettes in. And each day we would give each patient a package of cigarettes according to which ones they had in the canteen.
And we would take their cigarettes, a pack of cigarettes out a day each day and put it in a box. And then when every patient -- when the patients were given cigarettes, it was -- their cigarette was removed from their package and given to smoke.
Q So the patients did not get to keep the pack of cigarettes during the day?
A It depended on the patient, whether they

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were trustworthy. Some of the patients might carry their cigarettes. Other ones who couldn't, we kept them in the box.

Q And were there any patients on the floor that did not smoke?
A There were very few.
Q And what did -- did they receive any kind of distribution of anything from the canteen while the other people were getting their cigarettes?
A Well, if they wanted them, they would have candy bars available which would be in there. We had a bin for each patient in the canteen. It would be in their bin and we would get it out and give it to them when we passed out the canteen.
Q Were these the same bins or whatever that the cigarettes were stored in?
A Yes.
Q So some bins had cigarettes and some bins had candy bars?
A That's right.
Q Did you observe any of the staff of the hospital smoking in Building 16?
A Almost all of them did.
Q And would that include the nursing staff?
A Some of them. Yes. The nursing assistants and the RNs.

Q Would that include the physicians?
A Usually the physicians, if they smoked, they smoked in their offices.
Q But they smoked?
A Yes, some of them did.
Q How was the building heated?
A It was steam heat, steam radiators, hot water radiators.
Q And did this, the smoking, did it go on all day?
A Yes, from about 6:00 in the morning until the patients went to bed. Some patients who were privileged or who were more mentally alert who didn't want to go to sleep or couldn't go to sleep at 8:00 or 9:00, they would be up and watch television in the day room and smoke maybe until 10:00.
Q Did the -- when the people smoked -- let's go back. You say it started about 6:00?
A Yes. When they got up in the mornings.
Q And did the smoking -- did they smoke in their bedrooms?
A No, they got up and got their clothes on and went to the day room and smoked.
Q How many people would do that customarily?

A It depends on the condition of the patients on the wards. For the patients on third floor were ambulatory, probably most all of them would smoke a cigarette before they

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would go down to breakfast.
Q Most of them got up around 6:00 in the morning?
A That's right.
Q Were there any chain smokers on the floor that you observed?
A I'm sure there were some chain smokers. I can't recall any names at this time, but the ones who were privileged and carried their own cigarettes, they would smoke as much as they wanted to.
Q When this smoke would be generated from the patients and the staff smoking on the floors of Building 16, how long would it take for it to dissipate?
A It would take a long time. Because it was so constant, it's hard to say how fast it would dissipate. But like when they would come back from breakfast and they were all smoking at the same time, it would take a long time to clear out all that smoke so you

can see without a fog being above your head or down to your head.
Q When you were working third shift, did there come a time during the -- third shift is nights; right?
A That's right.
Q From when to when roughly?
A Excuse me?
Q What time to what time?
A 12:00 midnight to 8:00 in the morning.
Q And during that time period did the smoke ever go completely away?
A I suppose while the patients were sleeping it wasn't -- you know, the smell was always there.
Q Did it ever go completely away? Did the smell ever go completely away?
A No.
Q Were there fans or anything like that in the building during your time there?
A On third floor there was a large exhaust fan about three feet in diameter up near -- up near the ceiling on the wall. And on the other side of the room there was a smaller fan. I suppose it was maybe 18 inches that

was an exhaust fan, but it didn't take care of that much smoke.
Q Did they run the fans all year round?
A No. They would just turn them on whenever it got really smokey. And then there were always -- also fans on the walls in different areas that would move the air around, but they weren't exhaust fans.
Q Did there come times during the winter when they would turn the fans off?
A Yes, when it was cold.
Q Why would they turn the fans off when it was cold?

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A Because it would get too cold in there. The patients would complain to personnel that it was too cold.
Q And the fans running would make that happen?
A Yes.
Q Do you recall during this time period attending staff meetings at the hospital in Building 16?
A Yes.
Q What were these staff meetings?
A Well, they had staff meetings, like when the day shift came in, they would have a meeting

to discuss what needed to be done during the day or what -- if there was any policies or anything changed that needed attention right then. They would relay this to the personnel on day shift, and once a week the night shift was included in a staff meeting with the day shift in the break room. And it was for the same purposes, communication between all the nursing employees.
Q And you may have said this, but I didn't catch it if you did. Would these meetings take place at the same time every day?
A Yes.
Q What time was that?
A The night shift people would come into work at 7:30, and they would all meet in the break room. And on the mornings that night shift met with them, anytime after 7:30 we would try to get there for a meeting.
Q Would these -- did you attend all these meetings on a regular basis?
A Yes.
Q And did they occur pretty much as you described them throughout the time you worked there?

A No. That was -- that was -- I don't even know how long. The meetings between the employees when they came on duty was pretty much of the time. With the two shifts together, oh, I suppose it was the last -- I think the head nurse before Millie did that. I think it was about seven years, I suppose.
Q Did Millie Wiley attend any of these staffings, to your knowledge?
A Yes. She was the head nurse, so it was her meetings.
Q And she conducted them then?
A Yes.
Q I think there's been some testimony that she became a head nurse around the year 1985. Would that comport with your memory?
A Somewhere around there, uh-hum.
Q So from that point, the last six years, she would conduct these staff meetings?
A Yes.
Q Now, was there smoking taking place in these meetings?

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A Yes. The employees, all the employees that smoked, smoked at that time.
Q And the room where these staff meetings took

place, was it ventilated very well?
A No. It had a wall fan. It didn't have an exhaust fan.
Q So it just blew the smoke around?
A Yes.
Q How did the smoke affect you?
A It made me cough.
Q Did you take any reminders of the smoke home with you in the evenings or the mornings when you went home?
A Oh, yes. I was saturated with smoke, my hair, my clothes. I go from my garage into the utility room and take my uniform off right there. And then I would shower, wash my hair.
Q Was that true the entire time period that you worked there?
A Yes.
Q Now, did you ever participate in the process of getting into the bins in the canteen and the ward to take out cigarettes or candy bars for the patients?
A Yes. When I was on day shift, I did that.
Q And did you have occasion in so doing to observe what kinds, what brands were being

smoked in the hospital ward of Building 16?
A Yes, because each patient had their brand of cigarettes.
Q Can you tell this jury what some of those brands were?
A There were Camels, Chesterfield, Lucky Strike, Kent, Old Golds, Marlboros, Kools, Salems, Pall Malls, Philip Morris, and they had a generic brand, too, that wasn't labeled any particular brand. It was back when we had all the generic foods, it was in plain white wrappers, and it was generic cigarettes.
Q Mrs. Slaughter, you were looking as you were giving that, you were looking at a piece of paper in your hand, were you not?
A Yes.
Q As you sit here today, you don't have an absolutely perfect memory of everything that you have seen or thought about concerning this subject in the past, do you?
A Well, I'm like anybody else. I recollect some things and other things I have to think about. So I prepared a list as I thought about it at home.

Q And this is a list that was identified and submitted as a Deposition Exhibit 3 to your -- in your deposition which was taken last -- or in 1994, I believe; is that

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correct?
A That's right.
Q I'd ask you to look at that list that you have there, Deposition Exhibit 3, and I'd ask you to look at the next to the last item on that list. I don't think you mentioned that one.
A Winston.
Q You saw Winstons being smoked in the hospital?
A Yes.
Q And your testimony to this jury is that you saw each and every one of those brands being smoked in the Veteran's Administration Hospital in Building 16 during the years 1973 to 1991 when Mildred Wiley worked there?
MR. WAGNER: Leading and suggestive.
A That's right.
THE COURT: She can answer that.

What was your answer?
THE WITNESS: I said that's right.
Q Thank you. Now, you were -- you, as I remember, submitted to two different depositions in this case, did you not?
A Yes, I did.
Q When was the first deposition that you gave?
A December 1994, I believe.
Q And you gave another deposition when?
A I believe it was August of '97.
Q How long did the first deposition go?
MR. WAGNER: Your Honor, objection. Irrelevant.
THE COURT: How is that relevant? Sustained.
Q Do you recognize any of these gentlemen at the table as having been at your deposition?
A I don't recall.
Q Okay. During that deposition you were asked many, many questions about your knowledge of cigarette smoking and secondhand smoke and direct smoking, were you not?
MR. WAGNER: Your Honor, I think this is improper direct examination. It's irrelevant, anticipatory.

MR. CROSS: Your Honor, may we approach?
THE COURT: Well, I don't think that's necessary, Counselor. The last objection is sustained. Let's move on.
Q During the time that you were a nurse, did you ever receive any continuing education?
A Yes. We had classes that gave us education on many subjects.
Q And was this a continuing process from the year -- during your second stay at the VA Hospital from 1973 to your retirement in '92, was this true all the time, you were

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getting additional courses?
A There would be like seminars, yes.
Q It was a regular activity for nurses?
A No. It was scheduled by nursing education, and they would tell us to go to certain meetings for -- that was educational meetings.
Q And you were required to attend these courses from time to time?
A Yes.
Q During this educational process, did you ever receive any training or education or

information concerning the health hazards posed by secondhand smoke?
A No, we did not.
Q During your entire tenure at the Veteran's Administration Hospital, did you ever receive any bulletins or information or advisories from the Veteran's Administration as to health hazards of secondhand smoke?
A No, we didn't.
Q And during that same period, up until the time that Millie Wiley died, did you ever receive any information yourself as to the hazards of secondhand smoke?
A No, I didn't.
Q During this same time period, did you attempt to keep up on what was going on in the nursing profession?
A Yes.
Q From 1973 to 1991 did you read journals, nursing magazines, anything of that nature?
A Yes.
Q What were some of the publications you might have read?
A Most of it would be on patient care.
Q Did you ever read any of these that had as

their subject matter health hazards of secondhand smoke?
MR. WAGNER: Objection, Your Honor, as to what this witness may or may not have read that pertains to that subject. It's not relevant.
THE COURT: Overruled. You can answer that.
A Please state the question again.
Q Was the subject matter of any of these journals or publications that you read in an attempt to keep current on what was going on in your nursing profession from 1973 to 1991 a concern with the health hazards of secondhand smoke?
A No.
Q Do you believe -- strike that.
What would be your belief as to the extent to which you, as a nurse, would have had knowledge of such matters concerning health as opposed to someone who was merely a member -- a lay person who was not in your

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profession?
MR. WAGNER: Well, objection, Your Honor. No foundation, irrelevant.

THE COURT: I'm going to ask you to rephrase that question. I know where you're going here, but I want you to rephrase it.

Q People who are -- let me do it this way: Mrs. Slaughter, do you think that, in general, you kept up on current affairs in the nursing profession as much as other nurses?

A Yes.

Q Do you think that other nurses generally exercised the same amount of continuing interest in that subject as you did?

A You mean continuing education?

Q Yes.

A Yes.

Q Do you feel like you were about -- do you think you were all doing about the same in terms of keeping up on new trends and new affairs?

MR. WAGNER: Excuse me. I didn't mean to interrupt. This witness doesn't have foundation as to what every other nurse may have known.

THE COURT: You can answer that. I think the question was, generally did you

all have about the same level of continuing education.

A Yes. They tried to keep us abreast on updates in nursing, from nursing education, and I'm sure that a lot of us -- I did. I got magazines pertaining to nursing to keep up with our profession.

Q Now, what did your husband do?

A He was a factory worker.

Q Did he keep abreast of recent changes in health and nursing as you did?

MR. WAGNER: Well, Your Honor. Now we're really far afield.

THE COURT: Sustained.

Q Then let me ask the question that goes to the heart of it, Mrs. Slaughter. Do you believe that you, as a nurse who kept up with continuing education and kept current in affairs by reading journals and periodicals and so forth, did you have a better knowledge and understanding of current status of health affairs than the average person, than a lay person?

MR. WAGNER: Objection. No foundation. It's irrelevant also as to that

kind of an opinion coming from a lay witness, and there is no foundation laid here.

THE COURT: Sustained.

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Q Limiting your answer to just members of your profession, the nursing profession, you believe that you were as educated and familiar with the current affairs in nursing and health care as any other member of your profession during the time period you worked at the VA?
A I believe I was.
Q Let me just ask you this question then: When was the first time that you had an awareness in your life that secondhand smoke had the potential to cause lung cancer?
MR. WAGNER: Objection as to what this witness may or may not have known. It's not relevant.
MR. CROSS: It certainly is, Your Honor. Their defense is that Mildred Wiley knew and should have known better, should have got another job. And this witness is her contemporary, had the same education, was there during the same period, had the

same continuing education and knowledge and if she didn't know, Mildred Wiley didn't know, and it's probative and we should be allowed to go into it.
THE COURT: Mr. Ohlemeyer.
MR. OHLEMEYER: For the record, Your Honor, I'd move to strike Mr. Cross' characterization of our defense. There will come a time when we will get to present our defense and I think Mr. Cross shouldn't be telling the jury what he thinks our defense is.
MR. CROSS: Does he want to stipulate that is not their defense? I'll be happy to move on.
MR. WAGNER: We object to Mr. Cross' comments, Your Honor.
THE COURT: The last objection is sustained.
You may want to rephrase that, Counselor.
MR. CROSS: Might I have just a moment?
Q Mrs. Slaughter, when was the first time that you had an awareness that secondhand smoke

could cause fatal lung cancer?
MR. WAGNER: Objection, Your Honor, as to what this witness may or may not know. It's not relevant.
THE COURT: I'll allow it. You may answer.
A My first knowledge was when Mrs. Wiley died.
Q And what year was that?
A 1991.
Q Do you recall giving a contrary opinion during your deposition in 1994?
MR. WAGNER: Well, now, I'm going to object.

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THE COURT: Objection is sustained.
MR. CROSS: Do I take it that that subject matter is not to be explored during the course of her testimony?
THE COURT: You take it I sustained the last question.
Q Would you describe for the jury your personal relationship with Mildred Wiley.
MR. WAGNER: Judge, I believe this is all cumulative again if we're going down this road. We've heard this from four or five, six witnesses.

MR. CROSS: I don't think the testimony will take as long as Mr. Wagner's objection, Your Honor.
THE COURT: Tell us generally, ma'am, were you close friends with Mrs. Wiley?
A We were friends, especially while we were working. And there was not really a social relationship except we knew each other, and I have been at her home one time. And I would see her at different church functions, and we would speak. And I met her husband.
THE COURT: All right.
Q Did you ever have any conversations with Mildred Wiley about the health hazards of secondhand smoke?
MR. WAGNER: Objection, Your Honor. Hearsay.
MR. CROSS: That's a yes or no, Your Honor.
THE COURT: You can answer that yes or no.
A Would you rephrase it.
THE COURT: Did you talk to Mrs. Wiley about secondhand smoke. You can

answer that yes or no.
A Yes.
Q Did you ever talk with Mrs. Wiley about the health hazards of secondhand smoke and the possibility that it could cause fatal disease?
A No.
MR. WAGNER: Your Honor, move the answer go out. Calls for hearsay, Your Honor.
MR. CROSS: It's yes or no.
MR. WAGNER: What's happening here is counsel is interjecting in his question the subject matter which then calls for a hearsay yes or no answer.
THE COURT: Objection is overruled.
Your answer was, ma'am? What was your answer to the last question?
THE WITNESS: I said -- I think I said yes. Rephrase that question.
Q I'll be glad to ask that question again.
A If I can remember the question.

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Q Did you ever have any conversations with Millie Wiley about the health hazards of secondhand smoke and in particular whether

or not it could cause fatal lung cancer?
A No.
Q Thank you. Are you familiar -- in working with her in the same environment for that 17 years she was there, did you have occasion to observe whether or not she was taking the same continuing education courses you were?
A No. There were different times when there would be nursing education courses. And all the nurses could not leave the wards at the same time. Some of the courses would be repeated, and they would try to get everybody included. And then other times she would get to some of them and I would get to some of them.
Q But you were aware that she was taking courses throughout that time period?
A Yes. She would take the available -- go to the available meetings and courses on nursing education subjects.
Q You understood that she had -- that she was a registered nurse?
A Yes, she was.
Q And you understood that she was a head nurse for a long period of time, I believe you

said?
A Yes, she was.
Q Based on your education and your knowledge of Mildred Wiley's education, based on your experience together over that 17 years or whatever it was at the Veteran's Hospital in Building 16, what reasons, what possible reasons can you give this jury as to why a registered nurse would continue to work in a smoke-filled environment if it was known that secondhand smoke could cause fatal lung disease?
MR. WAGNER: Judge, we object. No foundation.
THE COURT: Sustained.
MR. WAGNER: Thank you.
Q Did Mrs. Wiley, to your knowledge, take care of herself physically?
A Yes, she did.
Q Do you know whether she observed her diet?
MR. WAGNER: Well, no foundation, Your Honor.
MR. CROSS: It's a yes or no.
A Yes, she did.
Q And do you know what -- did you personally

observe what measures she might have taken to care for herself?
A She just --
MR. WAGNER: Excuse me. There has

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to be a foundation laid here, Your Honor. Whether was she in her home for breakfast, dinner.

THE COURT: She said she was in her home one time. Are you talking about work, Counsel?

MR. CROSS: I am, Your Honor.

Q What did you personally observe in terms of what measures Mrs. Wiley took to take care of herself?

A Well, she was careful not to gain weight. If she gained a few pounds, she would try to get it taken off. She was very neat and clean and had very good hygiene.

Q Do you know, based on your familiarity with this woman in the nearly two decades you spent working with her, do you have an opinion as to whether or not she would have knowingly exposed herself to a potentially fatal health hazard?

MR. WAGNER: Well, Your Honor, this

is --

THE COURT: Objection sustained.

MR. WAGNER: These prejudicial questions that Mr. Cross is asking, the way he phrases it, Your Honor, it's just totally basically unfair to the defendants to allow this to continue to go on. This is probably the 10th or 12th time Mr. Cross has done this.

MR. CROSS: I have no more of these questions, Your Honor.

Q You've been retired since 1992?

A That's right.

Q Have you observed any effects on your health as a result of the time you spent at the Veteran's Hospital?

MR. WAGNER: Your Honor, objection. Not relevant.

MR. CROSS: I'll stand by the question, Your Honor.

MR. WAGNER: Your Honor, may we approach if we're going to argue about this?

THE COURT: I'll sustain the objection at this point.

Go ahead, Mr. Cross.

MR. CROSS: Can I have a moment to confer?

I pass the witness, Your Honor.

THE COURT: All right. Cross-examination, Mr. Wagner?

MR. WAGNER: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. WAGNER:

Q Good morning, Mrs. Slaughter.

A Good morning.

Q We've never met; right?

A Right.

Q My name is Richard Wagner. I'm one of the

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attorneys for a couple of the defendants in this case. I want to ask you some questions. I'm going to go kind of slowly back through some things and some of the things I may want to ask you about may have been covered in those depositions that you gave, that you told the jury about. Okay.

And if I don't ask you a question that you understand, why you just tell me and I'll try to rephrase it. Okay?

A Uh-hum.

Q All right. You were pretty well acquainted

with Mrs. Wiley, as you testified. You knew, did you not, that Mrs. Wiley worked at the Davis Clinic before she came to the Veteran's Administration Hospital?

A I knew she worked there.

Q Did you know she worked there for four years before she came to the Veteran's Administration Hospital?

A I wasn't aware how long she worked there.

Q But you do remember that?

A Yes.

Q Now, just to kind of put things in perspective a little bit, Mrs. Slaughter, you belong to a church that doesn't believe in smoking; correct?

A That's right.

Q And that church is the Wesleyan Church?

A That's right.

Q That's the same church that Mrs. Wiley and Phil Wiley belong to; correct?

A That's right. But I don't see what relevance that has to do with this.

THE COURT: What you want to do, ma'am, is answer the questions. The last comment will go out.

MR. WAGNER: Thank you, Judge.

Q Would it be fair to say, Mrs. Slaughter, that you said during direct examination that cigarette smoke makes you cough. You don't like cigarette smoke. Would that be a correct statement?

A No, I don't like it.

Q Would you characterize yourself kind of being extra-sensitive to cigarette smoke? You don't like to be around it anyplace; right?

A I'm not used to it.

Q Now, I'm not sure I was 100 percent clear on everything that you did when you began working at the Veteran's Administration Hospital after 1973, but during the years that you worked in Building 16, you spent most of your time working on the night shift and also on the evening shift. Would that be correct?

A All but four years.

Q And on the night shift would it be fair to

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say, Mrs. Slaughter, that there were fewer employees than there were during the daytime working?

A Let's see. Yes, there were fewer employees.
Q Thank you. And there would have been fewer visitors during those shifts? Evenings and nights?
A Evening shift we probably had more visitors than the days did.
Q But then the midnight to 7:30 a.m. shift there would have been, I suppose, very few visitors.
A There's not usually visitors at that time.
Q And Mrs. Wiley worked evenings and nights as well as days; right?
A When she was scheduled when they needed somebody from the day shift to cover.
Q But it's a fact, isn't it, that you don't recall ever working with Mrs. Wiley on the night shift; right?
A No, I don't believe I ever did.
Q And it's fair to say, isn't it, Mrs. Slaughter, that when Mrs. Wiley became the head nurse, she spent about half of her workday in her office?
A I don't believe she spent half of her workday sitting in her office. She was probably in and out of her office and that

may have amounted to a half day.
Q Do you recall telling us in your deposition that Mrs. Wiley spent about half of her day in her office after she became the head nurse. Is that a fair statement?
A That was an approximation, and I didn't say that it was continuous four hours that she spent in there.
Q Okay. But out of the workday after she became head nurse, out of that full workday, she spent about half of that day in her office. Whether she was in there continuously or not, but in and out about half of her day; right?
A Possibly, to the best of my knowledge.
Q And when Mrs. Wiley became the head nurse, she got her own office; right?
A That's right.
Q And her office was on the first floor of Building 16; right?
A That's right.
Q And from where her office was situated, it faced the hall; right?
A Yes, the door faced the hall.
Q And from where her office was situated, she

could not see the nurse's station; right?
A The nurse's station was on the same side of the hall.
Q So she could not see the nurse's station

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from where her office was; correct?
A No.
Q All right. And Mrs. Wiley did not have any ashtrays in her office, did she? That's a correct statement, isn't it?
A I don't recall seeing any there.
Q And she had a fan on the wall?
A Yes, there was a fan.
Q In her office?
A That's right.
Q And she had a window in her office; correct?
A There was a window there.
Q And generally speaking, everybody that worked in the Veteran's Hospital knew that Mrs. Wiley did not like smoking; right?
A No, she didn't like smoking.
I want to add something else to the question before. There was a window in her office but she could only raise it six inches.
Q Okay. And you never saw anyone smoking in

Mrs. Wiley's office; correct?
A I wasn't in there when other people were in there as a rule, and I don't recall that I saw anybody.
Q Well, it's a fact that, based upon your observations of Mrs. Wiley and what you can remember, you never saw anyone smoking in Mrs. Wiley's office; isn't that correct?
A I don't recall anybody smoking in there.
Q Thank you.
A But when I was in there, there wasn't anybody else in there usually.
Q In fact, you've been in Mrs. Wiley's office also when the window was open; right?
MR. CROSS: Your Honor, could we have a time reference, please, to these questions?
Q During the time that she was head nurse when she had her office, you were in Mrs. Wiley's office when she had the window open; right?
A If you would call six inches a window open, yes.
Q Was there some remodeling that was done in Building 16 from time to time?
A Yes.

Q And what did that consist of?
A Rearranging the walls.
Q Ceilings too?
A Yes. The ceilings had been lowered, I think three times on 16A.
Q Let's talk for a minute about the patients in Building 16. Isn't it a fact that during the last several years that you worked in Building 16 there were only 21 patients on the first floor?
A After they remodeled it the last time, which I don't recall what year it was, it was 21 patients.

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Q Now you recall, don't you, Mrs. Slaughter, reading in the early 1970s reports that were being published about somebody's assertion or possible assertions that there -- that exposure to secondhand smoke might cause lung cancer?
A I don't recall that in the '70s. I understand I said that in my deposition, but I was mistaken. There was no secondhand smoke information at that time, and I was confused with primary smoke.
Q Well, you do recall testifying about that in

your deposition; correct?
A I recall that's in my deposition, but it's wrong.
Q And --
A At that time that -- I did not get it straight.
Q And do you remember, Mrs. Slaughter, giving this answer to this question in that deposition at page 123:
"So it's your understanding, if I'm correctly understanding, that in the 1970s there was a general understanding among the nursing staff about publications and reports that exposure to environmental smoke could be a health hazard?
"Answer: Oh, yes, even my retarded son knows that. He listens to the news, he comes in and tells me when he hears it."
Do you remember giving that answer to that question?
A I told you I gave that answer, but I was confused in the time period. There was no such thing as articles on secondhand smoke at that time. It was primary smoke in the '70s. My son -- I was confused. My son was

too young at that time to even do such. This was in the late '80s.
Q Yes, ma'am. But all I'm asking is that you gave that answer to that question in your deposition; correct?
A Yes, I did in my deposition.
Q All right. And it's also a fact, isn't it, that in the 1970s that you believed that there was a general understanding among the nursing staff about publications and reports that alleged that exposure to environmental tobacco smoke could be a health hazard; isn't that right?
A I just told you that I was confused on that. There was no such thing. Nursing service knew that smoking, primary smoking was not good for your health. In fact, the Surgeon General came out with that information in '64. And there was no such thing on environmental smoke. Do you think we would have allowed patients to have it if we realized that?

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Q All I'm asking you, Mrs. Slaughter, is whether or not you answered this question with this answer in your deposition at page

122:

"Do you recall in the early 1970s reports beginning to be published about the possible association between exposure to secondhand smoke and lung cancer?

"Answer, yes."

A I believe I explained that.

Q Excuse me, ma'am. And the next question was, "And was that something that was widely reported at the time?

"Answer: Well, you heard it on the news and everything else. How could you help but not know it.

"Question: Did you ever have any discussions among the nursing staff when these reports began coming out?

"Answer: Only when policies changed.

"Question: When was that?

"Well, there were different times when reports would come out that the hospital would set up policies as to employee smoking.

"Question: Can you give me a rough-year period?

"Goodness, I believe it was probably in

the '70s when they came out and said that people weren't supposed to smoke in meetings but they still did."

Do you remember giving those answers to those questions in your deposition?

A I remember giving those answers.

Q And they were true at the time you gave them?

A No, they weren't, and I misunderstood. It was in the late '80s that there were publicity that the possibility of secondhand smoke was dangerous. Which never did come out and say that it caused lung cancer.

Q You remember, Mrs. Slaughter, that after you gave your deposition under oath in this case that you also were given an opportunity to read your deposition.

A Yes, I read it, but it did not -- it did not -- at the time I read it, I didn't realize. I guess I wasn't realizing the time reference that was stated.

Q And after you read your deposition, you understood you had an opportunity to make changes that were wrong? That is to say, to make changes as to testimony that you gave

that was transcribed into your deposition that was wrong. You understood you had an opportunity to do that, did you not?

MR. CROSS: Your Honor, Mr. Wagner

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is just arguing with the witness.
THE COURT: The last is a fair question. Did they tell you you had an opportunity to change an answer?
A Yes, they did, but I didn't realize that -- the time reference. I mean, he keeps talking to me about the time reference when I've told him that I did not understand at the time that I was saying the 1970s.
Q Well, let's move on.
It's also correct, isn't it, Mrs. Slaughter, that during the entire time that you worked in Building 16, patients were not allowed to smoke in their rooms?
A Yes, that was a fire hazard.
Q Nurses, I take it, would spend time in the patients' rooms caring for them; right?
A Yes.
Q And did the patients on the first floor go to bed about 8:00 or 9:00 p.m.?
A Yes.

Q And smoking in the Veteran's Administration Hospital was prohibited after the patients went to bed?
A Yes, it was prohibited in the bedrooms.
Q It was always prohibited in the bedrooms, wasn't it?
A Yes.
Q Now, you never complained about having to help patients smoke; isn't that correct?
A No.
Q It's not correct?
A No. I never complained.
Q You never made any formal complaints about the smoke; isn't that also correct?
A That's right. Just complained to people around me.
Q You talked about, in answer to Mr. Cross' questions, you talked about fans and where they were and also there was also a smoke eater in the day room. Isn't that correct?
A There was a smoke eater in the day room on the second floor. There was not an exhaust fan there.
Q But there was a smoke eater on the second floor in the day room?

A That's right.
Q And you also recall, do you not, Mrs. Slaughter, that the Veteran's Administration instituted no smoking policies and designated certain areas where smoking could be done?
A When are you referring to this?
Q I'm just asking if you recall that occurring. You do recall, do you not, that the Veteran's Administration issued no smoking policies and designated certain areas where smoking could be done?
A Yes. This was in the late '80s. Probably

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about '89.
Q Now, these windows in Building 16 that you referred to, I think you said they could be raised about six inches; right?
A That's right.
Q And they could be opened anytime; right?
A That's right.
Q And in the warm weather, the windows were always open, weren't they?
A Yes. It was hot.
Q And in colder weather they would be opened to get the air circulating and stay open

until it got too cold and then someone would close them; right?
A Yes, it depended on the weather.
Q And you recall when the Veteran's Administration installed window air conditioners in Building 16; correct?
A Yes, they installed one at a time as they had funds appropriated.
Q And talking about the day room in Building 16 on the first floor and fans, there was always an exhaust fan in the first floor day room; correct?
A I believe they took that exhaust fan out when they put the air conditioning in. I'm not positive.
Q Do you remember that you told us that that was the case in your deposition?
A There had been an exhaust fan in there. I can't recall if it was in there the last time -- the last time they did or not. I don't recall for sure. It seems like it was in the other window. The air conditioner was in one window.
Q Let me see if I can refresh your recollection. At page 81 of your deposition

do you recall this question and your answer:
"Did anyone ever suggest putting fans in the day room to help ventilation in the day room?
"Answer: There was one exhaust fan put in on the first floor."
A Now that I think about it, the second floor was the one that didn't have an exhaust fan. The first floor did. It was about, I suppose, an 18-inch exhaust fan.
Q Now, that list of cigarette brands that Mr. Cross asked you about; do you remember the questions that he asked you about those?
A Uh-hum.
Q And let me ask you a few questions about it. You worked at the Veteran's Administration, just to go back for a moment, from 1960 to 1965 and 1973 to 1992. Is that correct?
A That's right.
Q And all those years were a few years ago at this point; right?
A That's right.

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Q And when you -- before you made that list, Mr. Howard met and talked with you about that list?

A No. He called me on the telephone and asked me if I could recall. And I told him the names of some of the cigarettes.
Q In fact, in about October of 1970 -- 1997, Mr. Howard called you and asked you if you would sign an affidavit listing brands of cigarettes smoked at the Veteran's Administration; correct?
A That's right.
Q And then he prepared an affidavit and brought it out to your house?
A That's right.
Q This was on October 18, 1997?
A Yes.
Q Did he tell you at that time that it was something that would be used in this lawsuit?
A That's right.
Q Now, October of 1997 was five years after you retired from the Veteran's Administration Hospital; correct?
A Yes.
Q And you may not know this, but this lawsuit was filed in 1993, so it was four years after this lawsuit was filed; right?

A Yes.
Q And Mrs. Slaughter, you've given different versions of that list of cigarette brands that you identified; right?
A No, I don't believe it's different versions.
Q Do you remember --
A I added to my list when I went to the second deposition.
Q Right. Well, you were deposed in this case in your first deposition, and you talked about brands being sold at the Veteran's Administration; do you remember that? Do you remember identifying three brands?
A I believe the term used was sold. They were also smoked.
Q You said Camels, Lucky Strikes and Chesterfield were sold at the Veteran's Administration; right?
A Those were three of them, uh-hum.
Q Then when Mr. Howard came out to see you and you gave him an affidavit as to the brands, you mentioned Camels and Lucky Strike, Kent, Old Gold, Marlboro and Kool in that affidavit; right?
A To the best of my knowledge, that is.

Q And the list that you've given the jury here today is an even more expansive list; right?
A That's right.
Q What brand was that generic brand that you

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mentioned to the jury?
A All it said was generic. I don't know who made them.
Q As to that list of brands that you told the jury about, it's a fact, isn't it, Mrs. Slaughter, that you don't know what specific years those brands were sold or smoked at the Veteran's Administration?
A Between 1973 and 1992, I know.
Q But you don't know what specific years within that long time period that any of those brands were sold at the hospital; correct?
A I don't have a running list of what cigarettes were sold what years, but I know during the time I worked there, these cigarettes were sold and smoked.
Q Patients smoked cigars and pipes there too?
A Not very many. Occasionally you might have one that did.
Q Visitors brought the patients cigarettes,

cigars, pipes from time to time?
A On occasion they might.
MR. WAGNER: Let me check my notes here for a minute, Your Honor.
THE COURT: All right.
MR. WAGNER: I think that's all I have. Thank you.
THE COURT: Mr. Ohlemeyer, any questions?
MR. OHLEMEYER: Yes, Your Honor. Do you want to ask them now or take a break?
THE COURT: Go ahead.
MR. OHLEMEYER: Thank you, Your Honor.

CROSS-EXAMINATION
BY MR. OHLEMEYER:
Q Good morning, Mrs. Slaughter. My name is Bill Ohlemeyer, and I represent three of the companies Mr. Wiley has sued. And we've not met before today, have we?
A No.
Q I want to ask you a couple of questions. First of all, may I see the list that you brought with you?
A Sure.

Q Am I correct, Mrs. Slaughter, that you were deposed in this case in December of 1994? Do you remember that?
A Yes.
Q And do you remember that there was a court reporter there, just like there is today, that took down the questions and the answers?
A Yes.
Q And you remember Mr. Howard was there representing Mr. Wiley?
A Yes.
Q Mr. Cross and Mr. Motley weren't there;

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isn't that right?
A No. They weren't there.
Q And a man by the name of Mr. Koethe asked you the questions first. Do you remember that?
A I remember he asked me some questions.
Q And you remember at page 8, Counsel, line 5, that he told you if you didn't understand any of his questions, to let him know and he would clarify or rephrase the questions.
A Yes.
Q And you remember that he told you if you

wanted to take a break at any point in time that you should let him or Mr. Howard know and he would be happy to take a break?
A Yes.
Q And he asked you, even, if you were on any medication or anything that might interfere with your ability to understand the questions?
MR. CROSS: Your Honor, I will object to these questions. They are not relevant to any issue that's before this court.
THE COURT: Where are you going, Counselor?
MR. OHLEMEYER: To the errata sheet, Your Honor.
THE COURT: All right. Go ahead.
Q Do you remember that?
A Yes.
Q And you remember at the end of the deposition the court reporter asked everybody at the table, including you, whether you were going to read and sign the deposition? Do you remember that?
A Yes.

Q And Mr. Howard told you it was up to you whether you wanted to see a copy of what you said and you said you did.
A Yes.
Q And then do you remember the court reporter actually sent you a sheet of paper on which you could make corrections to the deposition?
A Yes.
Q Let me hand you what I've marked, Your Honor, for identification as Exhibit I-1.
MR. OHLEMEYER: May I approach?
THE COURT: Sure.
Q Is that the sheet, Mrs. Slaughter, that the court reporter sent you?
A Yes.
Q And you made those corrections to those pages?
A Yes.
Q And it's cut off at the bottom but that's the top of your signature there on the bottom right hand of that, isn't it?

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A It looks like it.
Q All right. And am I correct that on page 50, line 15, you said they wrote the word

"retired" when it should have been "returned"; right?
A That's what I wrote on the paper. I don't recall that line.
Q And there was another point where you said they wrote the word "she" and it should have been "we"?
A If I wrote it down, that's what it was.
Q Another one where it says "course" and it should have been "nurse"?
A Apparently that's right.
Q One said "on" and you said it should have been "off duty." Right?
A To the best of my knowledge, it must be. I wrote it there.
Q And then at one point in the deposition the word "occasion" occurred and you said it should have been "occasions" with an S.
A Yes.
Q Those are the only changes you wished to make following your deposition.
A I didn't notice anything else or I would have written it.
Q And am I correct at that deposition, Mrs. Slaughter, you listed three brands of

cigarettes that you could remember being sold at the VA?
A I also stated that there were other brands that I didn't remember.
Q But you could only remember three in December of 1994; isn't that right?
A That was on the spur of the moment, that's what I could remember.
Q And then there came a point in time in 1997 where Mr. Howard had you fill out an affidavit that contained some additional brands; isn't that right?
A That's right.
Q And there were six on that list?
A That's right.
Q And then today, February of 1998, you've brought this list.
A That was also on that second deposition.
Q And the second deposition was taken when, Mrs. Slaughter?
A August of '97.
Q So in August of '97 then there were 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 that you could remember?
A That's right.

Q Did you ever work with a nurse by the name of Marilyn Bardsley?
A Yes, I did.
Q Did you all work together at the VA?

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A We worked on the same building. There were times when we worked on the same ward.
Q What was her assignment?
A She was a staff nurse.
Q Where?
A Building 16.
Q What floor?
A Usually she worked on third floor.
Q Did you see her every day at work?
A Well, I saw her when she was there and I was there at the same time. Our schedules were according to nurses. They had to cover the assignments.
Q You had different assignments and different schedules; isn't that right?
A Oh, yes.
Q When is the last time you saw her?
A When is the last time I saw her?
Q Yes.
A I saw her yesterday.
Q And how?

A I met her in the hotel.
Q Did you have dinner together?
A Yes.
Q Am I correct, Mrs. Slaughter, that Mrs. Wiley didn't like cigarette smoke?
A That's right.
Q And she didn't allow cigarette smoking -- let me rephrase that.
You never saw anyone smoke cigarettes in her office?
A I don't recall seeing anybody smoke in her office.
Q And you doubt that anyone would have smoked in her office?
A I never said that and I don't know.
Q Well, do you remember page 60, Counsel, line 2, the December 19, 1994 deposition, Mrs. Slaughter, these questions and your answers:
"Question: Did you ever observe people smoking in her office?
"Answer: I never did.
"Question: Did she indicate to you that she didn't like or didn't want people smoking in her office?

"Answer: I don't think she ever did verbally but I know she wouldn't like that.
"Question: That was your understanding based on knowing her?
"Answer: I doubt that anybody smoked in her room."
Do you recall those questions and those answers, Mrs. Slaughter?
A I do recall it.
Q Now --
A I said I doubt it. I did not say that they did not or that they did.
Q Do you know whether there were health

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warnings or warnings on the packages of cigarettes that were used at the VA?
A Yes, as I recall, there was warnings on them after the Surgeon General.
Q And you understand who the Surgeon General is?
A Yes. He's the Surgeon General of the United States.
Q And do you know who operates the Veteran's Administration Hospital?
A The Veteran's Affairs.
Q Is that a government agency?

A Yes.
Q Do you know whether or if the Surgeon General of the United States issued any kind of report in 1986 about the health effects of exposure to environmental tobacco smoke?
A I don't recall.
Q Is it your testimony that no one at the Veteran's Administration Hospital ever said anything to you about any Surgeon General's Report?

MR. MOTLEY: Excuse me, Your Honor, I'll raise once more what I raised at your bench yesterday, and it's just one more incidence of what I raised yesterday, and I ask again for a 105 instruction. If they can persist in this line of questions, I think that the case is building that that needs to be given.

MR. OHLEMEYER: Your Honor, this was a question on direct examination of this witness.

THE COURT: The request for special instruction is denied.

Go ahead, Mr. Ohlemeyer.

Q Mrs. Slaughter, do you remember the names

of -- any of the names of the candy bars that were distributed at the VA Hospital?
A I don't recall the names of the candy bars.
Q Just a couple of questions, Mrs. Slaughter. Am I correct that there are laws that require certain procedures to be performed only by doctors and registered nurses?
A I never saw any laws. There are certain things that I understand nurses and doctors do.
Q And do you know whether -- let me rephrase the question.

There came a time in the 1980s in this part of Indiana where nurses were being recruited by other hospitals; isn't that right?

A Nurses were being recruited by who?
Q Other hospitals.
A I don't recall. I know VA recruited nurses.
Q Did there come a time, do you recall, in the '80s where the Medicare people tried to encourage the use of home care by nurses?

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Nurses in the home rather than putting people into the hospitals?
A When did you say that was?

Q During the 1980s.
A Yes. That was my understanding.
Q And that created a demand for nurses in this part of Indiana, didn't it?
A I wasn't aware of it.
Q You didn't -- a recruiter or nobody ever called you and ever tried to get you to move?
A No.

MR. OHLEMEYER: That's all I have, Your Honor. Thank you. I'll give the witness the list back.

THE COURT: Any redirect, Mr. Cross?

MR. CROSS: Yes, Your Honor, thank you.

REDIRECT EXAMINATION
BY MR. CROSS:
Q Mrs. Slaughter, you were -- did you have any specialization as a respiratory nurse?
A No, I didn't.
Q Did Millie Wiley?
A Not to my knowledge.
Q And there are such -- there are nurses who specialize in respiratory care; is that not

correct?
A There probably are now, because nurses have gone into all areas on specialization. And on units in hospitals that deal with respiratory problems, I'm sure there are nurses who are registered who are qualified and have had special education for this specialization.
Q Do you recall if there were any such specialized nurses during the time that you worked at the VA Hospital?
A No, I don't.
Q Mr. Wagner asked you a long series of questions about times when Mrs. Wiley was the head nurse and her office and its ventilation and things like that. Just to make sure we're clear on this time reference, this was after she became head nurse; correct?
A Come back with that question again.
Q Do you remember Mr. Wagner asking you questions about Mrs. Wiley's office?
A Yes.
Q And how long she spent in there?
A Yes.

Q And how the six-inch window and the fan and whatever. Do you remember those questions?
A Yes.
Q Now, your answers to those questions pertain

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to the time only when she was head nurse?
MR. OHLEMEYER: Objection, Your Honor, leading.
A Yes.
THE COURT: The last was leading and the jury will disregard the response. Rephrase that, Counselor.
MR. CROSS: I will, Your Honor.
Q During what period of time was it that you were referring to when you were responding to Mr. Wagner's questions about Mrs. Wiley's office?
A During the time she was head nurse.
Q And when was the time that she was the head nurse?
A I believe she became head nurse in 1985 or '86.
Q And did she have an office at any time prior to 1985 or 1986?
A No.
Q Okay. Now, do you know anything about an

open door policy that Mrs. Wiley had with regard to her office?
MR. OHLEMEYER: Objection, Your Honor, leading.
MR. WAGNER: Also outside the scope of redirect, Your Honor.
THE COURT: You can answer that.
A Her door was always open.
Q Do you know why that was?
A Because she didn't want to exclude herself from anybody. She wanted her office an open door so we could come in any time to talk to her.
Q Thank you. Did you ever see Mrs. Wiley actually light a cigarette for a patient?
MR. WAGNER: Outside the scope of redirect, Your Honor.
MR. CROSS: This is redirect, Mr. Wagner. It can't be outside the scope of it.
THE COURT: Overruled. You can answer that question. Did you understand the question?
A Yes, I have.
Q Why was smoking prohibited in the bedrooms?

A For safety reasons.
Q What do you mean?
A Patient may drop a cigarette, set the place on fire.
Q Was there smoke in the bedrooms, nonetheless, even though smoking was not permitted in there?
A Oh, it saturated all the air, wherever it was in the building.
Q Anywhere in the building?
A Yes.
Q Including Mrs. Wiley's office?
A Yes.

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Q Mr. Wagner read you an extended bit of testimony from your first deposition in 1994 in which you talked about your retarded son came in and told you things about that he had seen on television. How old is your son?
A My son is now 34 1/2.
Q And can you tell this jury the nature of his impairment?
MR. WAGNER: Well, Judge, this is irrelevant, Your Honor.
MR. CROSS: It is not irrelevant.

I'm entitled to explain her testimony.
THE COURT: Generally. Go ahead and answer that.
A He was brain damaged at birth and he had epilepsy.
Q When was he born?
A He was born in 1963.
Q So in the years of the 1970s he would have been anywhere from 7 to 16 years of age?
A That's right.
Q How old was he when he would come in and tell you about these reports he was seeing on television?
MR. WAGNER: Well, Judge, you know, this is improper. The answer that was read to her was her answer about what she knew, and she emphasized her answer in her deposition by referring to the fact that even her son would know that, and it's not proper to go into all that. That was just part of the deposition answer, Your Honor.
THE COURT: Overruled. You can answer the last question.
A My son finished school when he was -- it was in 1982, and after that he decided to have a

bike riding program for exercise, because we talked about exercise. I had two other sons who were high school students. And so he decided for his exercise he would ride a bike. And he would have a radio. And so in the late '80s he would come in because he knew that smoking had been in the news during that time, and he didn't like smoke, and he would come in and tell me anything he heard about it on the radio.
Q And I want to draw your attention to a specific provision in the deposition. This was in the testimony that Mr. Wagner read to you.
Page 122, line 20, Counsel.
MR. WAGNER: Excuse me, Your Honor, it's improper for Counsel to inquire of the witness about things that she said in her deposition. We're certainly allowed to question the witness on cross-examination about things she said in her deposition but it's improper for Mr. Cross to read parts of

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her deposition.
MR. CROSS: I was reading the same thing he read to her. I would like to ask

her the question --
THE COURT: Is it the same question he asked?
MR. CROSS: The same question he asked.
THE COURT: Go ahead.
MR. CROSS: Again, this is on page 122, line 20, for the record.
MR. WAGNER: Which deposition?
MR. CROSS: First deposition.
Q "Question: Did you ever have any discussions among the nursing staff --"
This is in the context of the early 1970s reports that he was talking about.
"Question: Did you ever have any discussion among the nursing staff when these reports began coming out?"
Your answer was: "Only when policies changed." And Mr. Wagner asked you if that was your testimony.
MR. WAGNER: Excuse me.
Q May I finish the question? And that was your answer. The question I have is what policies were you referring to in your answer?

A Those were the policies -- like I said, I was mixed up on the date. Those were the policies in the late 1980s when they started changing the rules for where personnel could smoke.
Q In the 1970s, was there any restriction on smoking anywhere in the Veteran's Hospital other than the bedrooms because of the fire hazard?
A No, there wasn't.
Q Now, being as how -- where is that errata sheet?
There has been submitted to you Defendants' Exhibit I-1.
MR. CROSS: May I approach, Your Honor?
THE COURT: Go ahead.
Q This, you understand, as Mr. Ohlemeyer questioned you, these are a list of items that you read and you found incorrect in your deposition and you corrected them; correct?
A That's right.
Q How many are there? How many things did you note?

A Five.
Q There were five different items. Now, let me suggest to you this: Your first deposition was attended by ten lawyers.

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MR. OHLEMEYER: Your Honor, I object to all of this.
THE COURT: Sustained to the last.
Q All right. The first deposition was 144 pages long.
A That's right.
MR. OHLEMEYER: Same objection.
MR. CROSS: This is relevant, Your Honor.
THE COURT: Sustained. Let's move on.
Q Mr. Ohlemeyer asked you some questions about whether or not you understood the ground rules of the deposition. Correct?
A Yes.
Q Whether you understood you could take a break, and if you didn't understand the question, you were supposed to give -- tell them so. Do you remember giving that answer?
A Yes. That's right.

Q Do you recall how long the first deposition took?
MR. OHLEMEYER: Same objection, Your Honor.
MR. WAGNER: Same objection, Your Honor.
MR. CROSS: He's asked her about her -- you know, whether she was alert and she understood the ground rules. I ought to be able to get into the fact that this was --
THE COURT: Objection sustained. Let's move on.
Q In any case, Mrs. Slaughter, do you have an impression as to whether these questions were asked of you near the beginning of your deposition, in the middle or near the end?
A It was near the end, close to 4:00 in the afternoon.
Q Thank you. Now, when you -- that was your first deposition. You gave another deposition, looks like last year sometime. Do you recall how long that deposition took?
MR. OHLEMEYER: Same objection.
MR. CROSS: I'll withdraw the

question.
Q In both of your depositions, Mrs. Slaughter, do you recall the court reporter giving you an oath to tell the truth, the whole truth, so help you God?
A Yes, I do.
Q And what does that mean to you?
A That means as close as I can recall and as truthful as I know.
Q Mr. Wagner asked you do you have any religious convictions about cigarette smoking. Do you remember that question?
A Yes.

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Q What are the nature of the convictions that you have in your religion concerning that subject?
A I was always taught that it was wrong to smoke because it was harmful to the body, and I have always felt that it was not good to put things into your body that would be harmful.
Q And does your religion have convictions about what your conduct should be when you assume an oath to tell the whole truth and nothing but the truth so help you God?

MR. WAGNER: Your Honor, I think the oath speaks for itself.
THE COURT: Sustained.
Q And as you sit here today, would you represent to this jury that you, in fact, told the truth to the best of your ability every time you have taken such an oath?
A I certainly have.
Q These cigarette packs that -- when you were discussing cigarettes from the canteen to the patients who smoked, you would actually take the cigarettes out of the packs and hand them to the patients, would you not?
A Yes.
Q And did you then -- you then had to assist the patients in smoking sometimes, did you not?
A Yes, we did.
Q How would you do that?
MR. WAGNER: Your Honor, it's all repetitious and outside the scope of our cross-examination and proper redirect examination.
THE COURT: I agree. Sustained.
Q Well, did you have to feed the veterans the

candy bars or were they able to unwrap those wrappers themselves?
A Usually if a patient had a candy bar, they would do it themselves because, if they weren't able to open up candy, there may be nuts and so on in it that they would choke. Unless they just requested it, we didn't order candy bars.
Q And what was the relative amount of cigarettes that you would dispense from the canteen as opposed to candy bars?
A It depended on the ward that you were on. Some wards no patients would get candy bars. Other wards there may be anywhere from two to maybe five. Depends on the size of the ward.
Q And how many people on those same wards would be given cigarettes?
A Any of them that smoked, which was usually all of them except maybe a few. One or two, three, depends on how many veterans were on that ward.

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Q Do you know what nitrosamines are?
MR. WAGNER: Objection, Your Honor. Outside the scope.

MR. CROSS: He was inquiring --
THE COURT: It's outside the scope.
MR. CROSS: He was inquiring into her knowledge of secondhand smoke. I didn't mean to intrude.
Q You stated -- Mr. Wagner was asking you a question about what your knowledge of secondhand smoke was in the 1970s, and you appeared to get upset with the idea that you, as a nurse, would be exposing to patients -- exposing patients in the hospital to a health hazard that could cause fatal lung disease.
MR. WAGNER: Your Honor, this is a speech. It's leading.
THE COURT: Rephrase that, Counselor.
MR. CROSS: Let me finish the question.
THE COURT: Rephrase that.
MR. CROSS: Thank you.
Q In the 1970s when you worked in Building 16, what knowledge did you have as to the health risks associated with secondhand smoke, in particular the possibility that it could

generate fatal lung disease?
MR. OHLEMEYER: I object to the question as argumentative, Your Honor.
THE COURT: I believe it is. Sustained.
Q What knowledge did you have about secondhand smoke and its health risks in 1970 -- in the 1970s?
A We had no information on this. We had -- all that I thought was that it was not good for your health.
Q Did anyone have -- do you know of any person who had any knowledge in the 1970s at the Veteran's Administration Hospital that secondhand smoke could cause fatal lung disease?
MR. WAGNER: Objection, Your Honor, no foundation as to what she might know and what everyone else knew.
MR. CROSS: That's not the question. I asked her if she knew any person, any one person.
THE COURT: Let me hear the question again.
Q Did you know any single individual at the

Veteran's Administration Hospital in the 1970s that was aware that secondhand smoke could cause fatal lung disease?
THE COURT: Objection sustained.

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Q Mr. Ohlemeyer asked you if you -- he brought up the fact that in your deposition he asked you if you remembered saying in your deposition that there were three brands.

MR. CROSS: Your Honor, I would like to read a few lines -- I would like to read the lines of testimony he was referring to in order to ask her a question in order to rehabilitate that particular testimony.

MR. WAGNER: Objection, Your Honor, it's improper for counsel who takes the witness on to read from a deposition.

THE COURT: Sustained.

Q Is there any question in your mind as you sit here today that all of the brands that you gave to this jury were, in fact, smoked by patients or staff at the Veteran's Hospital during the time you worked there?

A That's right.

Q And after all of Mr. Wagner and Mr. Ohlemeyer's questions, do you have

any -- does that affect the reliability of your earlier testimony that you had no knowledge of secondhand smoke until after Millie Wiley died?

MR. WAGNER: Objection, Your Honor, as to what her opinion is or her own reliability.

THE COURT: Sustained.

Q Was there anything about any of their questions that changed your mind from your testimony when I was up here about --

A The only thing I want to say is that --

MR. WAGNER: Judge, we're going to get a volunteer statement here.

THE COURT: I think your question is, if I understand you, correct me here if I'm wrong. Are you asking this lady if she wants to change any of her testimony from when you talked to her before?

Q As a result of anything these people asked.

THE COURT: You can answer that yes or no.

A No.

MR. CROSS: Thank you. Nothing further.

THE COURT: Mr. Wagner, anything further?

MR. WAGNER: I just have one brief question.

RECROSS-EXAMINATION

BY MR. WAGNER:

Q You described to Mr. Cross the seriousness that you attribute to giving testimony under oath; correct?

A Correct.

Q And it's correct, isn't it, that when you gave your depositions in this case you were under oath to tell the truth?

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A That's correct.
MR. WAGNER: Thank you very much.
THE COURT: Mr. Ohlemeyer?
MR. OHLEMEYER: Very briefly, Your Honor.

RECROSS-EXAMINATION

BY MR. OHLEMEYER:

Q Am I correct, Mrs. Slaughter, that as a nurse it was your practice to keep abreast of current health developments, new studies, declarations by public health officials about matters of public health?

A I tried.
Q And that was something that was fairly common among the nursing staff at the VA, wasn't it?
A Yes.
Q And you recall in the early '70s reports beginning to be published about the possible association between exposure to secondhand smoke and lung cancer; isn't that correct?
MR. CROSS: Your Honor, I'll object. This is repetitive to Mr. Wagner's line of questioning, Mr. Ohlemeyer's questioning, and I didn't go into that on redirect.
A I did not lie.
THE COURT: Just a minute, ma'am.
The objection is overruled. Repeat your question.
Q My question, Mrs. Slaughter, is isn't it a fact that you recall in the early '70s there were reports that were beginning to be published about the possible association between exposure to secondhand smoke and lung cancer?
A Not in the '70s. I told you I was confused

when that question was asked. I had the wrong date in mind.
Q And I understand that, but let me just make sure this question, that you agree with me, this question and this answer were asked of you at your deposition at page 122, line 9, Counsel.
"Question: Let me see if I can refresh your recollection on the matter. Do you recall in the early 1970s --"
MR. CROSS: Well, Your Honor, this is the same question. This was asked, it's repetitive, it's argumentative. Asked and answered.
THE COURT: You asked this question on cross?
MR. CROSS: Yes, he did.
MR. OHLEMEYER: This is a different question, different answer.
THE COURT: 24 is a different question. Go ahead.
Q "Do you recall in the early 1970s reports

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beginning to be published about the possible association between exposure to secondhand smoke and lung cancer?"

And your answer was "yes."

Do you recall that question and that answer?

A Yes.

Q And then the next question, Do you recall being asked whether that was something that was widely reported at the time? And do you recall your answer being, Well, you heard it on the news and everything else, how could you help but not know it. Do you remember that question and that answer?

A Yes.

Q And then do you remember being asked whether you had any discussions among the nursing staff when these reports became or began coming out, and your answer was only when the policies changed.

A That's right.

Q And there were policies that the VA put out about smoking in the hospital.

A In the late '80s.

MR. OHLEMEYER: That's all I have, Your Honor.

THE COURT: All right. You may step down. Thank you.

We'll take a 15-minute break at this point. The jury will be excused.

We'll be back in 15 minutes but I need to have the attorneys stay for a minute.

MR. CASSELL: All rise.

(Jury not present)

THE COURT: Jury is not now present. Who conducted the interrogation of Marilyn Bardsley yesterday on direct?

MR. CROSS: Mr. Cross.

THE COURT: I want to remind everybody there is a separation order on all witnesses. Part of that separation order that I issued on February 6, once you have testified and are excused by the Court, you may not reenter the courtroom. Now, I understand from the bailiff Mrs. Bardsley was in the courtroom this morning. And only the bailiff happened to see her and asked her to leave, but she was in here during a significant portion of this testimony. I don't know whether Mrs. Bardsley will be called again in this matter either by you or by the defense. But I am here to tell you, and that's why I put it in this order, I'm

going to rely on counsel. I'm not going to have any more of these problems.

MR. JOSEPH YOUNG: Your Honor, if I might --

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THE COURT: That's all.
(A brief recess was taken.)
(Jury not present)
THE COURT: All right. We're back on the record. Jury is not present.
Mr. Young, did you have a matter?
MR. JOSEPH YOUNG: No, Your Honor. I just wanted to assure you that I saw Mrs. Bardsley come into the court. I checked with Counsel at counsel table on your order to make sure and then I asked her to leave and I don't believe it was any more than five minutes. That would be my responsibility, Your Honor, and I apologize, but I wanted to make sure, and then I asked her to leave, so I was attempting to comply with your order to the best of my ability.
THE COURT: Thank you, Counselor. My point, when these witnesses -- when you talk to these witnesses, tell them this order is in effect.

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MR. JOSEPH YOUNG: Yes, sir.
THE COURT: Who will be your next witness?
MR. JOSEPH YOUNG: Be one of the fact witnesses, and Mr. Cross has that information.
THE COURT: All right.
MR. CROSS: Your Honor, the next witness will be Mrs. Jean Lavengood, please. And Mr. Motley will conduct the direct examination.
THE COURT: All right.
MR. MOTLEY: Do you want her to wait until the jury is in, Your Honor?
THE COURT: Please.
MR. MOTLEY: She is nervous.
MR. CASSELL: All rise.
(Jury present)
THE COURT: Be seated. Jury back in its entirety, together with all three alternates.
Mr. Motley, you may call your next witness.
MR. MOTLEY: Ms. Jean Lavengood, Your Honor.

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THE COURT: All right.
MR. MOTLEY: Go up there. The Judge is going to swear you in.
THE COURT: Would you raise your right hand.
PLAINTIFFS' WITNESS, MARTHA JEAN LAVENGOOD, SWORN
THE COURT: Have a seat right there, please. Would you tell this jury your name.
THE WITNESS: I'm Martha Jean Lavengood.
THE COURT: Would your spell your last name.
THE WITNESS: L-A-V-E-N-G-O-O-D.
THE COURT: Mr. Motley.

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DIRECT EXAMINATION
BY MR. MOTLEY:
Q Would it be fair to stay you're scared to death?
A Yes, it would.
Q You've been in a court of law before and testified in a --
A No, I've not.
Q I'm going to try to get through this as painlessly as possible and as quickly as

possible, but you must listen very carefully to my questions. And if one of these folks over here objects before you answer, you've got to give the Judge a chance to rule. Those are the rules. Okay? Will you try to do that for us?
A I will.
Q State your name and, I hate to ask you this, but your age for the record.
A Martha Jean Lavengood, and I'm 67.
Q Can you get up a little closer to the microphone so we can hear a little bit better.
Now, you said you were 67. Are you retired?
A Yes.
Q Okay. Where do you live?
A I live at [DELETED]

Q What occupation -- are you still working?
A No, I'm not.
Q Are you retired?
A Yes, I am.
Q And what were you when you were working? What did you do?

A I'm a registered nurse.
Q And you carry that through your life. Just because you retire, you still look at yourself as a registered nurse, don't you?
A Yes, I am.
Q You were proud of that, weren't you?
A Yes, I am.
Q Tell the jury about where you went to school.
A I went to school at Wishard Hospital in Indianapolis, Indiana, which is -- was General Hospital at the time I went.
Q And you took training there?
A Yes, I did.
Q Let's get right down to Mildred Wiley's case, okay. Can you tell us, did you know Mildred Wiley?
A I knew Mildred Wiley as a friend and as a co-worker.
Q When did you first meet Mildred Wiley as a co-worker and where?
A The first meeting I had with Millie was in 1954 at Home Hospital in Indianapolis -- or excuse me, in Lafayette. She was a student

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nurse and she was a night nurse on my shift

or on my ward.

Q And did you ever work at any hospital with Mildred Wiley other than the VA Hospital?

A Just at Home Hospital that one year.

Q That one year at Home Hospital?

A Yes.

Q Okay. And the jury has already heard testimony about it from other witnesses, but what kind of nursing did you do there?

A At?

Q Home.

A At Home Hospital? I was a pediatric nurse.

Q What kind of nurse was she?

A She was a student nurse at the time, and she worked the whole hospital.

Q They did what's called rotate; right?

A She rotated from unit to unit, yes.

Q When did you next professionally meet Mildred Wiley?

A In 1973 at the VA Hospital at Marion, Indiana.

Q And how was it that you met her there?

A We were assigned to the same building.

Q And that would be Building 16?

A Right.

Q Now, the jury has heard a lot about Building 16 and I don't want to repeat all that again, okay?

A Okay.

Q But tell the ladies and gentlemen of the jury, please, Ms. Lavengood, how long you worked as a colleague, professional nursing colleague of Mrs. Wiley.

A I worked with her from 1973 to 1976 and from 1986 to 1991.

Q All right. And both of these times were Building 16?

A Yes, they were.

Q From 1973 to '76, you all were both nurses?

A Yes, we were. We were staff nurses.

Q And did you work the same shift sometimes?

A We did, during that time, would work the same shift, yes.

Q Now, the jury has heard a lot about the conditions there from '73 to '76. I'm not going to ask you to go back into all the detail of that, but those patients were veterans, most of them were disabled?

A Yes, they were.

Q And large -- a large percentage of them

smoked?

A Yes, a large number of them.

Q And can you tell the ladies and gentlemen of the jury that, from '73 to '76, just generally in your own words describe the conditions in the building from the

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standpoint of smoke being in the air. Was it in the air or not?
A Most of the time it was always smoke filled. We put all the patients in a large what we call the day room, and they were allowed to smoke in this room. And it was -- when you walked in there, a lot of times it was blue with smoke.
Q Now, do you know what the term "chain smoker" means?
A Yes, I do.
Q What do you understand that to mean?
A A person that continually smokes one cigarette after another.
Q And were there any such as that amongst the veterans between 1973 and 1976?
A Yes, there were.
Q Now, the fact of the matter, from 1973 to 1976, Ms. Lavengood, was there anywhere you

could get in Building 16 that you didn't run into smoke?
A No, there wasn't.
Q Do you know what I mean when I say brand names of cigarettes?
A Yes, I do.
Q Do you know of your own knowledge that there are lots of different brands of cigarettes?
A Yes, I do.
Q Can you remember every brand of cigarette that was ever at that VA Hospital?
A No, I can't.
Q Do the best you can. Just tell them what you remember as best you can.
A Chesterfield, Lucky Strike, Camel, Pall Mall, Salem, Winston. I have a list. May I look at it? Right now that's all I can recall.
Q Do you know what a cheat sheet is?
A Yes. I know what a cheat sheet is. That's all I can remember right now.
Q Who made that list up that you got?
A I did.
Q When did you make it up?
A Mr. Howard called me one morning and said

that he wondered if I could remember the number -- the names of brand cigarettes that were smoked at the VA.
Q And did you -- I'm sorry. Go ahead.
A And I made up a list for him.
Q Have you got that list for you?
A Yes, I do.
Q Can I have it?
A Yes, you may.
MR. MOTLEY: Mark it for identification, Your Honor.
Q If I told you that your list contains the name Marlboro and Philip Morris, would that refresh your memory?
A Yes.

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MR. MOTLEY: Move the list into evidence, Your Honor.
THE COURT: Any objection?
MR. OHLEMEYER: At this point there is, Your Honor. It's hearsay. There is no foundation that it's prior recollection recorded at a time. It's just a list. We don't even know when the list was made or how it was made.
Q Could you tell us when it was made?

MR. OHLEMEYER: May I ask questions for foundation?
THE COURT: Go ahead if you have a question for objection.
MR. OHLEMEYER: Is it Mrs. Levengood or Lavengood?
THE WITNESS: Lavengood.
MR. OHLEMEYER: My name is Bill Ohlemeyer. Could you tell us when you made this list?
MR. MOTLEY: Approximately.
THE WITNESS: It was this fall, but I can't tell you exactly when.
MR. OHLEMEYER: This list that they've marked as No. 23, you made this fall?
THE WITNESS: I copied it from -- I copied it from the list that I gave you -- gave the tobacco company at a deposition that they took from me.
MR. OHLEMEYER: So what's been marked as 23 isn't a list that you made -- tell me when you made this list, when you wrote this list down.
THE WITNESS: I wrote that from

memory this morning.
BY MR. MOTLEY:
Q Is this list the best you can do today?
A Yes, it is.
Q Are you pretty nervous?
A Yes, I am.
Q And do you believe this to be honest and true as best you can remember today?
A Yes, it is.
MR. MOTLEY: Your Honor, I move its admission at this time.
THE COURT: Any objection?
MR. OHLEMEYER: Your Honor, under 803, I have no objection to her using it to refresh her recollection, but unless we offer it into evidence, it's not admissible.
THE COURT: Well, she can use that list to refresh her recollection, but the list itself could not come in unless -- he's right -- unless they offer it.
Q You can't talk to me without talking to the Court.
THE COURT: She can see the list.
Q Do you want some water?

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A No.

Q Just read that into the record, okay?
A Philip Morris --
MR. OHLEMEYER: Excuse me, Your Honor, she can use it to refresh her recollection to answer questions he asks, but I don't think she can read it into the record.
MR. MOTLEY: I ask you to look at 803-5, Your Honor, it's not hearsay.
THE COURT: You can ask her to refresh her recollection from that list and she can tell us what her memory is of the types of cigarettes that were at the VA.
Q Look at that list for a second, okay? Does that refresh your memory that Philip Morris and Marlboro were at the hospital when you and Mildred Wiley were there together?
A Yes, they were.
Q Okay. Now, did there come a time --
MR. MOTLEY: Excuse me one second, Your Honor, if I might.
Q Now, you -- excuse me, ma'am. You came back and you worked with Millie from 1986 to 1991?
A Yes, I did.

Q Now, ma'am, the brands of cigarettes you may remember, nervous as you may be, from 1986 to 1991, would they be the same or different from that list that you just gave the jury?
A Some of them would have been the same and there probably were new brands at that time.
Q But the ones you've read to the jury and you told the jury about, they were there again in 1986 to 1991?
A Yes, they were.
MR. WAGNER: Objection. That's leading and suggestive, Your Honor. Leading and suggestive.
THE COURT: Overruled.
Q They were there then, too, weren't they?
A Yes, they were.
Q Ms. Lavengood, listen carefully to this question, if you don't mind. Prior to Mildred Wiley getting sick with cancer and dying, as a nurse, did you know, did you personally know that smoke from other people's cigarettes could cause lung cancer and kill you?
MR. WAGNER: Well, Your Honor, objection, prejudicial characterization.

It's irrelevant as to what this witness knew and I think Counsel should be admonished about asking questions that have those kind of characterizations in them, Your Honor. We've heard about 15 of these.
THE COURT: That objection is

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overruled as it goes to what training the lady may have. You can answer the question.

A Could I hear the question?

MR. MOTLEY: Could the reporter read it?

(The requested material was read by the reporter.)

A No, I did not.

Q Did you leave the VA Hospital?

A Yes, I did.

Q When?

A In '76 the first time.

Q But I mean the second time.

A In 1991 after Millie's death.

Q Why did you leave the hospital?

MR. WAGNER: Objection, Your Honor, as to why she left. It calls for motivation, mental processes.

MR. MOTLEY: I don't understand

this motivation, mental process objection. Your Honor, there is no such objection in that rule book.

THE COURT: The objection is overruled. You can tell us why you left in '91.

MR. MOTLEY: Go ahead.

A I left in '91 to go up -- we moved away from Marion, Indiana. My husband worked in Gary, Indiana, as a teacher and I went to join him.

Q Now, did you know Mildred and you were friends with her?

A Yes, we were.

Q Just because you were friends with her, would you tell this jury anything untruthful?

A No, I wouldn't.

MR. MOTLEY: No further questions, Your Honor.

THE COURT: Mr. Wagner.

MR. WAGNER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WAGNER:

Q Good morning, Mrs. Lavengood.

A Good morning.

Q We've not met. My name is Richard Wagner. I'm one of the attorneys for one of the defendants in this case; a couple of the defendants, actually.

As far as cigarette smoke is concerned, that's something that you personally don't like; right?

A No, I don't.

Q And you sit in the no-smoking section in restaurants?

A Yes, I do.

Q And you wouldn't ride in a car with somebody who is smoking; is that so?

A Yes, it is.

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Q And you wouldn't sit in a room with anybody that smoked?
A Not if I can help it.
Q And Mrs. Wiley was a close personal friend of yours?
A We were friends, yes.
Q And Mr. Philip Wiley is a close personal friend of yours?
A Yes.
Q And you and Mrs. Wiley saw each other

socially and ate lunch together?
A Sometimes.
Q Went on religious retreats with her?
A Yes, we did.
Q And went out shopping together?
A Sometimes.
Q And like Mrs. Wiley, you also did missionary work, isn't that so?
A Yes, I did.
Q And in 1973 Mr. Philip Wiley telephoned you and asked you if you would be a witness for him in this lawsuit against the tobacco companies; isn't that so?
A In what year?
THE COURT: You said '73, Counselor.
Q I'm sorry. 1993.
A Yes, he did.
Q And you told him you would be glad to do it; right?
A I told him I would.
Q He telephoned you long distance from North Carolina?
A Yes, he did.
Q Now, let me focus for a moment on your work

at the Veteran's Administration Hospital so I can get this straight. You worked at the Veteran's Administration Hospital from 1971 to August of 1976; correct?
A That's correct.
Q And Mrs. Wiley began her work there in 1973; right?
A That's correct.
Q So you only worked with Mrs. Wiley about three years during that period of time; right?
A That's correct.
Q And then from August of 1976 to October 1986, for ten years, you were not an employee at the Veteran's Administration Hospital; correct?
A That's correct.
Q Now, during the 1973 to 1976 period that you worked in Building 16, you were there as a staff nurse; right?
A Pardon me?
Q During the period 1973 to 1976, you worked in Building 16?
A Correct.

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Q You worked there as a staff nurse; correct?

A Correct.
Q And you worked predominantly on Floor B; right?
A Correct.
Q Floor B is the second floor?
A Yes.
Q And you spent about 90 percent of your time on Floor B, the second floor; correct?
A Probably.
Q And Mildred Wiley worked about 90 percent of her time on Floor A, the first floor; correct?
A Probably.
Q And during this period 1973 to 1976, you and Mrs. Wiley did not always work the same days or the same shifts; did you?
A Usually.
Q Usually what?
A Usually we did work the same days and same shift.
Q But there were days when you and Mrs. Wiley did not work the same days and same shifts; correct?
A Correct.
Q And during this period, 1973-1976, there was

a head nurse in Building 16, wasn't there?
A Yes, there was.
Q And her name was Linda Caron?
A Linda Caron.
Q Caron. Linda Caron. And during that period there was a nurse for each of the three floors in Building 16; right?
A Yes, there was.
Q And there were two or three nursing assistants on the first floor and three or four on the second floor and two or three on the third floor; right?
A I believe that's correct.
Q Now, let's go to the next period. You returned to the Veteran's Administration in 1986; right?
A I returned in 1983. I didn't work on 16 until 1986.
Q All right. You returned to the Veteran's Administration and began work in Building 16 again in 1986?
A Correct.
Q And you worked there until 1991.
A Correct.
Q And during that period of time you were the

evening charge nurse in Building 16, weren't you?
A Correct.
Q And so you worked nights.
A Afternoons.
Q Well, what shift is that, 3:00 to 12:00?

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A Yes.
Q 3:00 p.m. in the afternoon until around 12:00 midnight?
A Correct.
Q During that period of time Mrs. Wiley was a head nurse, wasn't she?
A Yes, she was.
Q And she worked days; right?
A Yes, she did.
Q Back in that period, 1973-1976, isn't it correct, Mrs. Lavengood, that there were only about 25 patients on Floor A, the first floor?
A I don't really remember how many patients were on it. I believe that to be so, but I'm not sure.
Q Well, you remember telling us that was the number of patients on the first floor in Building 16 during 1973-1976 when we asked

you that question in your deposition?
A I believe in that deposition I told you that I thought that was how many that was there.
Q That was your best estimate; right?
A Right.
Q Thank you. And by the 1980s the patient count in Building 16 was reduced, wasn't it?
A Yes, I believe so.
Q And it was reduced on all three floors; right?
A Yes, it was.
Q And there were 21 patients, as best you could recall, when you left the Veteran's Administration.
A Correct.
Q Now, during the 1971 to 1976 period of time, the nurse's station was first in a separate office; isn't that correct?
A Yes, it was.
Q And then later -- it wasn't until later that it was opened up and made a part of the day room; right?
A About a year and a half to two years later, I believe.
Q And actually the nurses spent very little

time in the nurse's station; isn't that correct?
A We spent most of our time in the day room with the patients.
Q Well, my question is about the nurse's station. You spent very little time in the nurse's station.
A Correct.
Q And you didn't actually hang around the day room all day long either, did you?
A We were where the patients were. If they were in the day room, yes, we were.
Q The patients were in their bedrooms and the rooms they were assigned to, you had to be in there from time to time, did you not?

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A We checked on our patients, yes.
Q You had to administer medications to them and when they were in the rooms you had to do that; right?
A Correct.
Q You had to chart?
A Correct.
Q Sometimes you had to take patients to other places in the hospital?
A The nurses didn't do that.

Q Who did that? The nursing assistants?
A Correct.
Q And you were a nurse and did you supervise the nursing assistants?
A Yes, we did.
Q And that was one of your duties, to see that the nursing assistants carried out their duties; right?
A Correct.
Q Now, when Mildred Wiley became the head nurse in Building 16, she got some new responsibilities, didn't she?
A Yes, she did.
Q And when she was the head nurse, assisting patients to smoke was not one of her responsibilities; isn't that correct?
A No, that is not --
Q Well, do you remember when you were asked that question in your deposition?
MR. MOTLEY: Excuse me, Your Honor, the lady was trying to complete her sentence. Counsel interrupted.
THE COURT: Did you complete your answer?
MR. WAGNER: Go right ahead.

A As a registered nurse, Millie was required to do whatever the patients needed. That was not one of her duties, but if she were in the room with the patients or in the day room with a patient and they wanted to smoke, it would have been her duty to have helped them.
Q My question was, Mrs. Lavengood -- perhaps you didn't understand it. Let me rephrase it.
After Mrs. Wiley became the head nurse, when she was a head nurse, assisting patients to smoke was not one of her responsibilities; isn't that correct?
A No. It's the responsibility of a nurse even as a head nurse. If a patient requests something, she would help them.
Q Let me ask you if you remember being asked this question and giving these answers in your deposition taken in this case on December 19, 1994, at pages 80 and 81:
"Question --"
This was about Mrs. Wiley and assisting smokers.

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"Would that have been her responsibility as head nurse or would this have been back in the earlier time period in the '70s?

"Answer: Oh, it would have been definitely during the '70s if no one else was available. It would have been in the other time frame, too.

"Question: Would it be fair to say that during the '80s it would not be one of her general responsibilities as head nurse to assist the patients in smoking?

"Answer: Yes."

Do you remember giving those answers to those questions, Mrs. Lavengood?

A That's right. But you asked me if as a registered nurse she still, no matter what her duties on her -- as a head nurse were, she was still required to help the patients.

Q The answer that you gave to those questions that were asked in your deposition were accurate; isn't that right, Mrs. Lavengood?

A Yes.

Q As a nurse, did you have to feed the patients?

A Yes, we did.

Q Administer medication to them?

A Yes, we did.

Q You had to check on the patients from time to time?

A Yes, we did.

Q Doctors would come to the hospital from time to time to see their patients?

A We only had one doctor per floor. Excuse me. We had a doctor assigned to our building.

Q And that doctor would come sometimes to see his patients; right?

A Correct.

Q And you had to assist the doctor sometimes while he did go see the patient?

A Not always.

Q I understand not always, but from time to time you would go along with the doctor and talk to the doctor about the patient; right?

A Yes.

Q Now, Mr. Motley asked you some questions about your knowledge about certain things. Actually you had discussions with Mrs. Wiley in which you discussed your beliefs that smoking was unhealthy, didn't you?

A Yes, I did.

Q But you're not aware that Mrs. Wiley ever complained to anyone in the administration at the Veteran's Administration about smoking; isn't that correct?

A In the earlier times we talked among

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ourselves. I don't know about the later times. It was brought up at head nurse meetings.

Q Listen closely to my question, Mrs. Lavengood. My question is: It's a fact, isn't it, that you're not aware that Mildred Wiley ever complained to anyone in the administration at the Veteran's Administration Hospital about smoking. Isn't that true?

A I don't know.

Q Well, do you remember you were asked in your deposition that question, pages 130 to 131:

"Question: Did Mrs. Wiley ever complain to anyone in the administration at the Veteran's Administration Hospital about the smoking that was going on there?

"Answer: I don't know whether she did or not. I mean, they smoked -- all the

patients smoked in all the buildings."

Do you remember giving that answer to that question?

A Yes.

Q Let's talk about some of the things that relate to smoking there in the Veteran's Administration Hospital, Mrs. Lavengood. Do you recall that at some time prior to 1986 no-smoking areas were designated in that hospital, don't you?

A Repeat that, please.

Q You recall that prior to 1986 no-smoking areas were designated in the Veteran's Administration Hospital?

A They were allowed to smoke anywhere, yes.

Q That's not my question, Mrs. Lavengood. My question was: Do you recall that at some time prior to 1986 no-smoking areas were designated in the hospital?

A I don't understand your question.

Q You understand what a no-smoking area is?

A Yes.

Q Where people can't smoke.

A Right.

Q I'm talking now about the Veteran's

Administration Hospital.

A Yes.

Q And my question is: Do you recall that prior to 1986 no-smoking areas were designated in the Veteran's Administration Hospital?

A There were no designated smoking areas prior to 1986.

Q I'm talking about no-smoking areas prior to 1986. Do you remember that there were places where you couldn't smoke in the Veteran's Administration Hospital prior to 1986?

A No. Sir?

Q Yes, ma'am.

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A They were not allowed to smoke in their bedrooms at any time, if that's what you mean.
Q Well, let me see if I can refresh your recollection. At page 7 when you were asked about these subjects -- I'm trying to figure out where to start here.
"Question: In more recent time period that you worked there --"
MR. HOWARD: Is there a line

number?
Q Page 70, line 05. "The last year and a half or two years I worked there, the nursing assistants and the nurses had to go outside to smoke. Last year would have been --" and then the question: "It would have been the 1990, 1991 time frame or prior to that?
"Answer: Oh, it was probably 1990.
"Question: Nurses had to go outside to smoke?
"Answer: All personnel had to go outside. They had designated smoking areas.
"Question: And those were outside of the building?
"Answer: Uh-hum, or on the carport.
"Question: Was there a smoking shack that was built during that time you worked there?
"Answer: No.
"Prior to that policy going into effect for the personnel, what restrictions were there with respect to smoking by the personnel? I think you mentioned designated areas.
"Answer: The designated area in the

office and the break room.
"Question: How was that policy communicated to the personnel?
"Answer: Written memos from the office.
"Question: Do you remember that was a policy that was in effect when you started back in 1986? Is that correct?
"Answer: Yes."
Do you remember giving those answers to those questions?
A I'm not sure of the time frame. I remember giving that answer. I'm not sure of the time frame when they first started designating smoking areas. It would have been sometime in, around that time, but I'm not sure of the time.
Q Well, those are the answers you gave us to those questions in your deposition, and that was your best recollection at that time; correct?
A That's right.
Q Do you recall that Mrs. Wiley had no ashtrays in her office? Isn't that right?

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A She did not.

Q And, in fact, you recall Mrs. Wiley requesting people not to smoke in her office, don't you?
A Yes, I do.
Q And when you first started working at the Veteran's Administration, at least 25 percent of the staff that worked there did not smoke; isn't that right?
A Probably.
Q And all the visitors that came there didn't smoke either, did they?
A Visitors smoked.
Q Every one of them that came there, did they?
A No.
Q During the entire time you worked at the Veteran's Administration, patients were not allowed to smoke in their bedrooms; right?
A That's true. That's true in any hospital.
Q And they weren't allowed to smoke in their dormitory rooms?
A Well, the dormitory rooms and the bedrooms are the same thing.
Q Same thing? And during the entire time you worked at the Veteran's Administration, patients were not allowed to smoke after

9:00 p.m.; isn't that right?
A That's correct.
Q And some patients went to bed earlier than 9:00 p.m.; right?
A Sometimes.
Q And during the entire time that you've worked at the Veteran's Administration, patients were only allowed to smoke three or four times each day.
A That's correct. But we had parties quite frequently and they were allowed to smoke at the parties.
Q And you recall that at some point ventilation fans were put at each end of Building 16; right?
A Yes, they were.
Q And the windows in Building 16 could be opened?
A They were not -- at one time the buildings -- the windows were nailed shut and another period of time they could only be opened by six inches. That was to prevent suicides.
Q Do you recall telling us in your deposition that the windows in Building 16 could be

opened if it was not real cold outside?
A In the earlier years I worked there they could, yes. But not in the latter years.
Q You didn't tell us anything about the latter years when we deposed you, did you, Mrs. Lavengood?

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A I didn't think about it.
Q Now, let me ask you about this list of cigarettes that Mr. Motley asked you about. Do you recall giving a deposition in this case in December of 1994; right?
A Yes. It was some --
Q When you were deposed in this case in December 1994, you said you could only remember five brands of cigarettes that were dispensed or smoked at the Veteran's Administration Hospital, didn't you?
A That's correct. They were having me remember things back 25 years before. I didn't remember them.
Q And as to this list that Mr. Motley asked you about, let me ask you some questions about how you came up with that list. Mr. Max Howard contacted you by phone between September and October 18, 1997, to

talk to you about that subject, didn't he?
A Yes, he did.
Q And there were two phone calls?
A There were three phone calls.
Q All right. Mr. Howard asked you if you would sign an affidavit listing the brands of cigarettes smoked at the Veteran's Administration Hospital?
A Yes, he did.
Q And in that telephone call that you had with Mr. Howard, you never told him the brands of cigarettes he should put in the affidavit, did you?
A I made up a list of cigarettes for him.
Q In your deposition when we deposed you, you told us that you never told Mr. Howard the brands of cigarettes he should put in the affidavit, did you?
A I'm very much aware of that. If you'll remember, I had been sick and had been in the hospital on Tuesday before that. And you people had me very confused.
Q All right. Well, you got a second call from Mr. Howard and he brought the affidavit out to you, didn't he?

A Yes, he did.
Q Between that first and second call, you didn't do anything to refresh your recollection about the brands of cigarettes that you thought were sold or used there at the hospital, did you?
A I told you I made a list.
Q And when you made up that list -- let's stick with this first time that Mr. Howard came to you with the affidavit. He came out to your house with an affidavit that he had prepared and asked you to sign it, didn't he?
A Yes, he did.
Q And you listed in that affidavit brands of

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cigarettes; right?
A Yes, I did.
Q Howard was there in your home about 15 minutes?
A I don't recall how long he was there.
Q Now, in your -- in that affidavit you listed seven brands of cigarettes. Right?
A Yes, I did.
Q And that list that you brought to court today, three, six -- now you've got nine

brands of cigarettes; right?
A That was a list I took to -- the day that you took the deposition.
Q So if we total all these up, you've given three different versions as to the brands of cigarettes that were sold and dispensed there at the Veteran's Administration Hospital; isn't that so, Mrs. Lavengood?
A That's true, but I remember different ones after thinking about it.
Q And as to all those brands that you've told the jury about, it's true, isn't it, that you don't know which of those brands were smoked between 1971 and 1976; right?
A It would have been any of those brands because not all the patients smoked the same thing.
Q And you don't know which of those brands were smoked from 1971 up to 1973 when Mrs. Wiley started to work; right?
A Repeat the question, please.
MR. WAGNER: Withdraw the question.
Q You don't know what brands were smoked at the hospital during the ten years from 1976 to 1986 while you weren't employed at the

hospital; correct?
A Correct.
Q And in 1973-1976, you worked on the second floor of Building 16; correct?
A Correct.
Q Mildred Wiley worked on the first floor?
A Correct.
Q And when you worked from 1986 to 1991, you worked nights and Mrs. Wiley worked days; correct?
A Correct.
MR. WAGNER: Your Honor, I believe that's all I have.
THE COURT: Fine, Mr. Wagner.
Mr. Ohlemeyer, any questions?
MR. OHLEMEYER: Just a few, Your Honor.

CROSS-EXAMINATION
BY MR. OHLEMEYER:
Q Mrs. Lavengood, my name is Bill Ohlemeyer, and I represent three of the companies Mr. Wiley has sued.
Do you know a nurse by the name of Marilyn Bardsley?

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A Yes, I do.

Q And how is it you know her?
A I worked with her at the VA and I also run around with her socially.
Q Do you know a nurse by the name of, is it Mary Jane or Mary Slaughter?
A Yes, I do.
Q And when is the last time you saw either Mrs. Bardsley or Mrs. Slaughter?
A This morning.
Q Did you have dinner with them last night?
A Yes, I did.
Q Dutch treat or did somebody get stuck with the bill?
A I think -- I don't think that's necessary.

THE COURT: Answer the question.

A Dutch -- we didn't pay for the meal.
Q Mrs. Lavengood, am I correct that in July of 1995, before you -- before anyone took your deposition in this case, Mr. Howard had you sign an affidavit about the Veteran's Administration Hospital?
A Yes, he did.
Q And that affidavit didn't say anything about brands of cigarettes that were smoked at the VA; right?

A That wasn't brought up then.
Q But am I right?
A Correct.
Q So then in December of 1994, a deposition was taken, right, where you were asked --

MR. MOTLEY: Excuse me, Your Honor, I again ask for a 105 instruction. Counsel well knows what that affidavit, the first one was intended for, and I don't need to say any more further here. I think Your Honor knows what that affidavit was intended for and Counsel well knows that. I think that's unfair and I would ask for a 105 instruction.

THE COURT: We'll take the request up at the break, Mr. Motley.

Go ahead, Mr. Ohlemeyer.

Q In December of 1994, your deposition was taken; right?
A Yes, it was.
Q And Mr. Howard was present at that deposition; right?
A Yes, he was.
Q And then in October of 1997 Mr. Howard prepared the affidavit Mr. Wagner asked you

about; right?
A Yes, he did.
Q And he typed that affidavit, not you; right?
A Yes, he did.
Q In fact, he misspelled your name a few times, didn't he?

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A Yes, he did.
Q And then a deposition was taken in November of 1997; right?
A Around that time, I believe. I don't remember the exact date.
Q And Mr. Howard and Mr. Young and Mr. Cross were there, Mr. Wiley's lawyers; right?
A I believe so.
Q And Mr. Tittle, who took the deposition, asked you to let him know if there were any questions you didn't understand and he would rearrange them or make it so it would make more sense to you; isn't that right?
A Correct.
Q One other question, ma'am. You mentioned, in a question Mr. Wagner asked you, you said something about discussions you had had in earlier times. Do you remember that -- my question is what did you mean by earlier

times?
A I don't know.
MR. OHLEMEYER: That's all I have, Your Honor.
THE COURT: Mr. Motley, redirect?

REDIRECT EXAMINATION
BY MR. MOTLEY:
Q Are you okay? Do you want some water?
A No. That's all right.
Q Are you upset?
A It's okay.
Q Do you feel like you can go forward?
A Pardon?
Q Can you go on?
A Yes.
Q Have you ever heard of Disney World?
A Yes.
Q Would you tell me the -- if there was much difference between Floor 1 and Floor 2 of Building 16?
A You mean different from Disney World?
Q No. I was thinking about fantasy land but what I mean was, you had nurses on Floor 1?
A Yes. They were the same.
Q You had patients on Floor 1?

A Yes, we did.
Q You had doctors on Floor 1?
A Yes, we did.
Q You had visitors on Floor 1?
A Yes.
Q You had cigarettes on Floor 1?
A Yes, we did.
Q And people smoked those cigarettes?
A They did.
Q And they did all those things on Floor 2?
A Exactly.
Q Now, you were asked by Mr. Wagner about your knowledge of Mildred Wiley outside of the VA Hospital. Do you remember that?
A Yes, I do.

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Q And you have known them since 1954, haven't you?
A Yes, I have.
Q And he asked you when she was outside the VA Hospital she avoided smoke. Do you remember that?
A The period from 1954 to 1971 I was not around Millie, but yes, I do know that she didn't. We always ate in smoke-free areas.
Q But in 1954 you all were in the hospital

together, weren't you?
A Yes, we were.
Q Was there smoking in the hospital then in 1954?
A Not in -- no, not in the unit I worked in because it was a pediatric unit.
Q Where did she work?
A She rotated around the whole hospital, but the smoking would have been -- there was no open area of smoking, no.
Q And some of the parts of the hospital, even though you were in pediatrics, there was smoking in 1954, was there?
A Yes.

MR. WAGNER: Objection, leading. She just --

THE COURT: Rephrase it. That was leading.

Q Listen carefully now. When you were in the pediatric ward, obviously the kids didn't smoke.
A No.
Q Mildred Wiley was all over the hospital; right?
A You're right.

MR. OHLEMEYER: This is Mr. Motley testifying.

MR. MOTLEY: I'm reorienting her to her testimony in the interest of time.

THE COURT: It's all right, go ahead.

MR. WAGNER: It's also outside the scope of cross-exam. She wasn't asked about whether there was any smoking at any other hospitals during her cross-examination. She was asked about her knowledge of Mrs. Wiley, that she was friends, now we're going back into her hospital days when she was a student nurse in 1954, '55.

MR. MOTLEY: He asked her to her personal knowledge did Mildred Wiley always avoid smoking outside of the VA Hospital. I think they brought it up and I'm entitled to ask her about it.

THE COURT: The objection is overruled. Go ahead.

Q Listen carefully. You were in the pediatric ward?
A Yes.

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Q No smoking there?

A Yes.
Q Mildred Wiley was a student nurse?
A Right.
Q She went all over the hospital?
A Right.
Q To your personal observations in those other parts of the hospital, not in pediatrics, was there smoking?
A Yes, there was.
Q Now, you were asked about whether Mildred Wiley and yourself knew that cigarette smoking, though neither one of you smoked, was unhealthy; do you remember that?
A Right.
Q Now, unhealthy, do you mean things such as coughing?
A I knew it was an irritant to the respiratory tract only.
Q And you don't call lung cancer an irritant to the respiratory tract, do you?
A No.
Q You were asked some questions, ma'am, about complaints. Do you remember that?
A Yes.
Q Whether Mildred complained?

A Yes.
Q Do you remember testifying in your deposition that --
MR. WAGNER: Excuse me, Your Honor. It's not proper to ask a witness on direct examination or redirect questions and answers --
THE COURT: Sustained.
MR. WAGNER: Thank you.
Q Do you recall whether or not you and Mildred Wiley had discussions, general discussions, about being around smoke, that it was irritating to you?
A Yes, we did.
Q Now, about all these brands that you were asked about, okay, as you sit here today, do you have a clue all the cigarette brands that Mr. Wagner's client, RJ Reynolds, has manufactured and distributed in Indiana since 1954?
MR. WAGNER: Objection, Your Honor.
A Absolutely not.
MR. WAGNER: Excuse me. Move the answer go out.
THE COURT: The answer will go out.

MR. WAGNER: Improper question, no foundation, irrelevant.
THE COURT: Overruled. You can answer that question.
A I do not.
Q You don't have a clue, do you?

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A No.
Q Do you know what a monopoly is?
MR. WAGNER: Well, Your Honor --
MR. OHLEMEYER: Objection, Your Honor.
THE COURT: Sustained.
Q You were asked about patients going to bed at 9:00. Do you remember that?
A Yes.
Q Are veterans -- when the veterans went to bed at 9:00, were they strapped in their bed or something?
A No, they're not.
Q Are they like normal people? Do they get up sometimes?
A Some of them did, yes.
Q Did some of them go to the day room?
A Yes, they did.
Q And the nurses who were there, they didn't

go to bed at 9:00; the ones who are on night shift didn't go to bed at 9:00, did they?
A No.
Q In your presence did they smoke, some of them?
A Yes, they did.
Q Now, do you really remember -- remember you talked to me about chain smoking, what that was?
A Yes.
Q He asked you they only smoked about three or four times a day. Do you remember that question?
A Yes.
Q Do you really, as you sit here today, back in the '70s and '80s, did you count up the number of cigarettes those veterans smoked every day?
A No, we didn't. Part of the patients could smoke on their own.
Q And as far as this list is concerned, Mrs. Lavengood, are you trying -- are you doing the best you can?
A Yes, I am.
MR. MOTLEY: I have no further

questions. Thank you.
THE COURT: Thank you, Mr. Motley.
Mr. Wagner, anything further?
MR. WAGNER: We have no further questions, Your Honor.
THE COURT: Mr. Ohlemeyer.
MR. OHLEMEYER: No.
THE COURT: Thank you very much, ma'am, you may step down.
Call your next.
MR. CROSS: Plaintiffs would call Beth Kreider.
May I ask, while my colleague is retrieving her from the other room, how long the Court wishes to go before the noon

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break?
THE COURT: I think they bring the jurors' meals around noon.
MR. CROSS: Would you like me to close at that point in time? I will probably go a little longer than 15 minutes.
THE COURT: We'll see how we're doing.
MR. CROSS: Okay.
THE COURT: Raise your right hand.

PLAINTIFFS' WITNESS, BETH KREIDER, SWORN
THE COURT: Have a seat right there, please. Would you tell this jury your name.
THE WITNESS: Beth Kreider.
THE COURT: Spell your last.
THE WITNESS: K-R-E-I-D-E-R.
THE COURT: Thank you.
Mr. Cross.
MR. MOTLEY: Excuse me, may I approach Mr. Cassell? The lady ran off with the list and he asked me to get it.
THE COURT: Thank you, Counselor. Go ahead, Mr. Cross.
MR. CROSS: Thank you.

DIRECT EXAMINATION
BY MR. CROSS:
Q Mrs. Kreider, you are a married lady, are you not?
A Yes.
Q And you are something of a newlywed; isn't that true also?
A Yeah. Few months.
Q And, in fact, you gave a deposition -- you submitted some affidavits and some

depositions in this case at various times and you were going by another name in those days?
A Yes.
Q What was your former name?
A My name was Beth Brewer.
Q Now, Mrs. Brewer, where do you live? I'm sorry, Mrs. Kreider, where do you live?
A That's okay.
Q I forgot already.
A I forget sometimes too. I live in [DELETED] or in the rural area around [DELETED]

Q And for those people who aren't from the [DELETED] area, can you tell them generally where [DELETED] is?
A Probably about 10, 12 miles west of [DELETED] and possibly about 15 or 20 miles from [DELETED].
Q Are you employed at this time?
A Yes, I am.
Q What you do?
A I'm a home health aid mentor, an aid for Visiting Nurse Association, North Central,

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Indiana, which is headquartered in Elwood,

Indiana.

Q Let me ask you first, how long have you been doing this kind of work?

A Home health aid work?

Q Yes.

A For probably eight, ten years.

Q What kind of work is that? What do you do?

A We go into the people's homes, help them in their homes with their personal care or with their housekeeping needs or things like this to help them be able to independently stay in their home and keep them out of long-term care facilities.

Q How long have you worked in the health care field, Mrs. Kreider?

A About 22 years.

Q But you started out in another field, did you not?

A Other than the health care field?

Q Yes.

A I was a schoolteacher before that.

Q Where were you a schoolteacher?

A Different places. I taught in parochial schools.

Q And was that here in Indiana?

A In Indiana and in Henderson, Kentucky.

Q And what grades or classes did you teach?

A Elementary grades and multiple-grade classrooms where we allowed the students to work at their own level and progress as independently as possible.

Q There came a time, did there not, when you came to work at the Veteran's Hospital in Marion, Indiana?

A Yes.

Q Could you tell the jury when that was?

A February of 1976.

Q February of 1976. How did you come to be employed by the Veteran's Administration in Marion?

A Well, my mother had passed away, and I moved back to the Grant County area to be with my father and to help care for my elderly father. And I had several friends who worked out there, and made me aware of the benefits and the job security, so I applied with the Civil Service Task and took the civil service exam to be hired at that time.

Q Did you pass the exam?

A Yes.

Q And you were hired in February of 1976?

A Right.

Q What position were you applying for?

A I hired in as a nursing assistant because that was basically the fastest way to get hired in there, and my intentions were to go

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into their educational therapy department at a later date which I never did.

Q How long did you work as a nurse's assistant at the VA?

A Totally, probably about five years. I left nursing service and worked in medical supplies for about 12 years.

Q And can you give us some rough dates as to when -- let me ask you this: Did you eventually retire or leave the employment of the VA?

A I resigned from the VA in 1994.

Q And did you work at the VA continuously from '76 to '94?

A Yes.

Q And now, could you please outline for the jury what you did during those 18 years?

A The first few years that I was there, I worked in nursing service as a nursing

assistant. I left nursing service and went into what in the real world is called central supply, at the VA it was called supply processing distribution, where we handled and dispensed the medical supplies to the units. If it was needed for patient care and was not a pharmaceutical item, then we probably handled it through our department.

Q And then you say you did that for 12 years.

A Yes.

Q Then what happened? What did you do after the 12 years?

A Well, it was in 19- -- late '89 or '90 that my husband was in very poor health at that time, and I needed to be home in the daytime more so that I could be with him. So I asked to be reassigned to nursing service so that I could work off tours.

Q And what job did you then have?

A I applied for a nursing assistant's position and asked and voluntarily signed papers asking to be reassigned as a nursing assistant from supply.

Q And was that essentially the same type of

work you had in the first couple years you were there?

A Yes.

Q While you were in supply, did you obtain any management position?

A While I was in supply I became the supervisor of central -- of SPD, of central supplies.

Q And how long were you the supervisor of that department at the VA?

A Probably about nine, ten years.

Q Now let's go back to the beginning. The first few years that you were at the VA Hospital you were a nurse's assistant. Is that the same thing as a nurse's aide?

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A Right.
Q Could you tell the jury what your job responsibilities were as a nursing assistant?
A Basically we did the patient care, depending on whether -- what type of ward you were working on, you might have more hands-on care. If you were working in a psychiatric care unit, which was an ambulatory psyche unit, you might have less hands-on care but

be with the patients to supervise them and be with them during their duties.
If you were on a total care unit, which I worked on more of -- as a regular basis, you helped them with their personal care. Many of the patients were bedfast or wheelchair bound. Some of them had to be fed, some of them had to be shaved, some of them had to have everything done for them. It just depended on what unit you were on at the time.
Q Did you ever have any experience in Building 16 of the VA Hospital?
A During the first part of my work as a nursing assistant, I was not assigned to Building 16. But we pulled relief and I really -- you know, if they were short of help, we might be sent there, but I really couldn't tell you what buildings I was assigned to on relief work at that time.
Q In the first two years or so?
A During the first years that I worked in nursing.
When I went back into nursing in '89 or '90, I was assigned to Building 16 as a

nursing assistant.
Q Full-time?
A Full-time.
Q And the first couple years, is it fair to say that you were pretty much all over the hospital?
A You're pretty much all over the hospital, yeah, because if you have overstaffing and someone has call-ins, then you work on their units.
Q During that -- well, let's go to the time that you were in supply then. What was the nature of your duties in supply initially as just an employee and then as a supervisor during the years 1977, '78 to 1990 or whenever it was -- does that sound approximately correct on the dates?
A Yeah. While working in supply we would go to each nursing unit of the facility and inventory their stock of medical supplies and then go back to the supply unit, pull the supplies from the stock, or someone would pull them and they would be delivered to the unit and restock the assigned areas

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where supplies were stored.

That was my initial duties when I went into supply, was as a supply clerk, doing this, a medical supply clerk, doing the inventories and stocking of the supplies.

Q So you would actually physically be involved in the process of distributing supplies to the various buildings?

A Right.

Q Did that include Building 16?

A Yes.

Q How often would you have occasion to go to Building 16 during those days?

A Sometimes you might be on a unit like that several times in one day because of the type of patients they had and the amount of supplies they used. You might be there several times. Or they might get a new patient that needed supplies that they didn't normally use, so you might be on the same unit half a dozen times in a day.

Q Did you have occasion to go out into the hospital buildings after you became a supervisor?

A As a supervisor, I was a working supervisor, and I worked with my people and with the

nurses to try to give them the supplies they needed to their satisfaction and to the best of patient care, so yes, I probably was on the units as much as before and on a regular basis. I was probably in my office less than I was on the wards.

Q So with specific reference to Building 16 during the years that you worked in supply, approximately how often would you get into Building 16?

A I was probably there maybe six, eight times a week at least.

Q Now, during that experience as a nurse's aide after you first got there and then up until 1980 when you worked in supply and then even thereafter, I believe you said you were in Building 16 when you went back to being a nurse's aide; correct?

A Right.

Q During that experience at the hospital, did you have an opportunity to observe the type of patients that inhabited Building 16?

A Yes.

Q What can you tell the jury about the kind of people that were hospitalized there?

A On Building 16 it was kind of an intermediate medical psyche unit. They were the patients who were maybe less ambulatory than they had been at one time. They might even be patients that have been at the hospital for a number of years and maybe

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been on what we call outside buildings because they were not connected to the inside corridor, and they might have gotten older. Obviously they had gotten older, but they might have lost some of their abilities to ambulate on their own or their health problems might have caused them to need closer supervision, so they were housed in the units that had connecting corridors.

Q How would you generally describe them, again throughout the years you worked and had some contact with the patients there, from the time you first started work until you ended? That's the class of patients that were there during that entire period?

A I think over the years they probably became more of a -- it changed because, partially because of remodeling projects and they cut the patients' beds down because they had

less open wards, so to speak, and more private two- and three-bed units for the guys. And also they piped in oxygen and air to the units, so they could take care of more of the respiratory problems in that area.

So as the years developed, that became more of a long-term medical unit where the guys still probably had psychiatric problems but they had more medical problems along with their psychiatric problems.

Q Would you tell the jury what you personally observed in terms of the smoke conditions that existed in Building 16 while you worked in the hospital?

A It was a very smoke-filled building because entering that ward from the corridor you went into the open area which led you into the day room which was where the guys smoked. It would meet you with a cloud of smoke. I mean, you know, you could see it when you walked in. Sometimes it was hazy. It would -- just depended on how many guys were in the day room smoking at the time.

Q How would you compare the smoking -- how

would you compare the smokey atmosphere in Building 16 to other places you've been in your life?

A Most places I've been haven't been smoke-filled areas until I went to the VA to work. But that building probably was as smokey as any building unless you were on a locked psychiatric unit where the guys were confined totally to the building and couldn't leave it at all.

Q As a nurse's assistant, did you ever engage in the process of assisting the patients smoking?

A That was part of our job, was to -- many of the patients on Building 16 and the building

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138 where I had worked prior were patients who, because of their conditions maybe couldn't carry their cigarettes, so they were kept in the nurse's station, and we gave them cigarettes at assigned times or when they had time. Or if they needed supervision, when you had time to sit down with them while they smoked a cigarette. And we would dispense the cigarettes to them. And some of them you had to hold

their cigarettes for them while they smoked them.

Q Mrs. Kreider, I want to draw your attention to one particular patient that you and I have discussed in the past, and recognizing that there is a matter of patient confidentiality, we won't mention his name. But are you familiar with this -- do you know the gentleman to whom I'm referring?

A You're probably referring to the one I told you about that would clinch the cigarette so tight in his mouth that you would burn your fingers trying to remove it from his mouth.

Q What was the nature of this gentleman's physical condition?

A He was a total -- total care quadriplegic. He had movement of his head, neck. He could lift his arms, but he had no body control. He was a Vietnam veteran who had been in Vietnam.

Q So he was -- what does the term "quadriplegic" mean?

A Total paralyzation, mainly no control of his body and muscles.

Q And he was then unable to put cigarettes in

his own mouth?

A No.

Q Did you assist this gentleman in smoking?

A Yes, frequently. In fact, this particular patient that we're talking about was on Building 138 when I first went there to work and he was on 16 when I was reassigned to 16. His condition had worsened where he had been moved from 138 to the other building.

Q When you were first involved in the process of assisting this gentleman, this veteran in smoking, approximately how many times a day would he have a cigarette?

A Anytime he could con somebody into giving him one because he would sit and yell for cigarettes. Most of the time, and because of his condition and because of his age, most of us felt kind of sorry for him. He didn't have much in life to look forward to because he was young and that was the one thing that he did enjoy. That and his food, because he was blind also.

Q Was this gentleman still alive when you left the hospital?

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A Yes, he was.

MR. OHLEMEYER: I have an objection to this based on foundation and relevance. If I might ask the witness a question to support the objection, it might make sense to the Court.

MR. CROSS: I've essentially concluded this.

THE COURT: That objection is overruled.

Go ahead, Mr. Cross.

Q I just wanted to ask you, you mentioned that you burned your fingers?

A Yes.

Q How does that happen? How do you get your fingers burned?

A He would clinch the cigarette so tightly in his teeth that you would have to pry it out and you could burn yourself when you were doing this to take the cigarette butt away from him.

Q Did that happen to you?

A That has happened to me on occasion, yes.

Q Are you aware of any artificial mechanical devices which were used to assist the patients of Building 16 in smoking?

A I really don't know if they were using it on 16. I really don't remember. You're probably talking about what we referred to as smoking robots that we purchased while I was working in supply service, and this was an ashtray that had a cigarette holder on the ashtray. You attached the cigarette to that and then you had like a three-foot tube or hose that went into the patient's mouth and you lit the cigarette and they were able to smoke it. But as long as they could hold that in their mouth themselves, they could smoke it without someone actually having to hold the cigarette for them.

Q Were these devices put into use at the hospital?

A They were put in on a trial basis. We purchased 12 of them through connections we had with the Hines Veteran's Hospital, which was a rehab hospital in Chicago. They were not -- we never purchased any more of them because of the sanitary conditions and the problems involved in using them, because each patient would have had to have had his own tube, so to speak, and it was kind of a

hassle, the staff felt, to do that.

Q Did you know Millie Wiley?

A Yes, I did.

THE COURT: I don't think she answered your last question. He asked you whether or not these were put into use in

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the hospital.
A They were put into use, but only the 12 that we bought for the evaluation. They were not purchased and kept as a stock item which we would call putting them into use because they were stocked and available upon request. The 12 we purchased may still be in the hospital somewhere, but we never purchased any more than the initial 12 that were purchased to evaluate.
THE COURT: All right. Thank you.
Q Did you know Millie Wiley?
A Yes, I did.
Q How did you know her?
A I knew her as a staff nurse when I worked in supply, because she was frequently the charge nurse on her building, and she was one of the people that I worked with in stocking supplies, and she would be one that

would requisition supplies from central, from SPD.
Q During the years, the 12 years you were working in supply and you would have occasion to go to Building 16, how many of those times each week that you would go to Building 16 would you have to discuss something with her?
A That would vary greatly depending on whether she happened to be the charge nurse for the day or not, in charge of the unit, or whether we were doing a special product evaluation that she had been placed in charge of. So it would -- you know, I probably saw her every few days, but it would depend on what I was doing and what she was doing -- what she was assigned to that day whether I spent a lot of time with her.
Q Did you get on a first-name basis with her?
A Yes, but I was on a first-name basis with most of the nurses.
Q In the entire hospital, or just Building 16?
A Yes, all of the hospital.
Q Did you have occasion to observe her and her

conduct of herself as a nurse?
A Yes.
Q How would you describe that to the jury?
A She was a very dedicated, conscientious person who cared for her patients and was concerned that they be cared for properly and that things be done for them in a timely manner, according to their needs.
Q During the time that you worked at the Veteran's Administration Hospital, was it required that any time that you take classes or receive additional training?
A Yes. We had constant inservices, I think monthly inservices in nursing service.
Q While you were a nurse's assistant?

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A Right.
Q Tell the jury what inservice, what you mean by that.
A An inservice would be maybe an hour, two-hour session on something concerning patient care, ask or maybe learning to help them be more independent by exercise or proper ways to lift and things like that.
And then once a year we had a full, one-day seminar or training session which we

got our CPR certification, practiced the Heimlich maneuver and worked with dealing with a combative psychiatric patient and how to handle the psychiatric patients without getting hurt.
Q During any of those courses or training programs, was the subject of the health hazards associated with secondhand smoke ever discussed?
MR. WAGNER: Objection, Your Honor, relevancy.
THE COURT: Overruled. You can answer that.
A Not specifically that I recall, no.
Q Thank you.
Now I want to take you to the time that you were in supply. Can you tell the jury generally how cigarettes would come into the VA Institution and then were distributed to the various wards for the patients that smoked?
THE COURT: Actually, before we do that, they tell me the jury's lunch is here, so I think we'll take a break at this point.
Ma'am, you may step down. We'll see

you again at 1:15.
(Standard admonition)

THE COURT: We'll start again at 1:15, Counsel.
MR. CASSELL: All rise.
(Jury not present)
THE COURT: All right. Jury is not present.
Mr. Motley, you had a request for a special instruction?
MR. MOTLEY: Your Honor, this is really unfair to the plaintiffs here. These lawyers are good lawyers, they know better than to bring up, keep insinuating the VA claim into this proceeding. There's an exclusive remedy mandated by federal law. What they're trying to do is have it both ways. They want to blame the VA, and the only way they can blame the VA -- and I'm not an Indiana lawyer, Your Honor, but I've tried cases in Indiana before. And I believe under the law applicable to this case, you've got to prove that the sole

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fault here was the Veteran's Administration

or the Veteran's Administration's negligence or whatever they're trying to insinuate here is not relevant at all. And to interrogate this lady when they either knew or should have known, and if they don't know, I would be surprised, that under the Veteran's Administration regulation, she didn't have to identify the products, that there was no requirement. That's not a products liability claim. That's like a Worker's Comp claim, and all they had to do was describe the circumstances, the extent and the disease and satisfy the other administrative requirements.

To stand up here and cross-examine this woman when she had absolutely no obligation to have placed in there, and it was not relevant to the inquiry at the time, what products are in there is just another example; and I hope you'll forgive me, Your Honor, but every time they want to do this, I want to bring it to Your Honor's attention because it's having a cumulative effect. I would respectfully ask Your Honor at some point in time a 105 instruction during this

case is appropriate, to let this jury know, before they wander down that wrong path, which would not be fair to anyone in this courtroom, and think that the VA's -- that this lady has a claim, to wind the VA to this courtroom, she's precluded from federal law bringing them in here. For these defendants to hide behind this is unforgivable in my humble opinion, although I know opinions aren't usually humble.

THE COURT: Thank you, Mr. Motley.

MR. OHLEMEYER: If I may, Your Honor. This is all precipitated by an affidavit that was prepared by Mr. Wiley's lawyers, signed by these witnesses, provided to their experts in this case, attached to motions and pleadings they have filed in this case, sworn to by the witness. It's a fair cross-examination.

If they want to come in here and have the jury believe that these women remembered all of these brands without any prior thought or any prior participation, I mean, it all goes to credibility, and the Court has wide discretion on credibility. And I

thought we were very careful about how we did what we did, but that affidavit has been part of this case since the minute this case was filed. They've given it to all their experts and had them rely upon it and it forms the basis of some of their opinions.

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I don't think Mr. Motley -- I'm not going to say anything.

THE COURT: Mr. Howard?

MR. HOWARD: Your Honor, that affidavit was attached to the Worker's Comp claim along with an affidavit of Carol Pfizer and along with another affidavit. That affidavit came from the Worker's Comp file. That's where they got it. When they got the Worker's Comp file, they only took three depositions in this case. They took the deposition of Slaughter, Lavengood and Pfizer, and those were the affidavits that were filed in Worker's Comp.

And Worker's Comp had nothing to do with brand identification, and they've cross-examined them in their depositions and all that, why, and here in Court to try to impeach them to show that they gave a

different affidavit one time and sworn statement to the contrary.

That's the only three people they knew to depose, and the way they got that was from the Worker's Comp file. They knew where that came from when they asked that question. There was one place it came from, the Worker's Comp.

It doesn't matter that we later gave it to experts and they used it for information, because the experts weren't interested in brand identification either. They were trying to get some idea of the exposure.

So for Mr. Ohlemeyer to stand up and say that was part of our case, that was part of our Worker's Comp case, and that was it. And that's the way they knew about it, and they're using that to try to impeach the witnesses.

MR. WAGNER: Your Honor, we are entitled to impeach the witness with prior inconsistent statements. That's so rudimentary, I don't know how that can even be an issue.

THE COURT: I understand.

MR. WAGNER: And no mention was made by Mr. Ohlemeyer about Worker's Compensation claims at all. The affidavits that these witnesses have been mostly asked about were affidavits that were submitted to you to support or rather to fend off, if you will, the summary judgment motions that we made based upon lack of product identification. That's where those affidavits came from. And they have given different testimony in depositions and those affidavits submitted to Your Honor, and the testimony that they've given in court today about how many brands they could remember being sold and used in the hospital.

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Now, surely we're allowed to get into inconsistent statements. What could be more rudimentary? And no mention has ever been made about Worker's Compensation claims or anything else. Mr. Motley just keeps wanting to hammer away at this, keep hammering away at it.

And one other thing on this proximate cause thing, Your Honor. We are entitled to argue to the jury that we are not the

proximate cause of this lady's injuries. I mean, it's an elementary proposition of law under any legal theory, and what we have in this case is strictly a products liability theory, and the plaintiffs have to prove that the defendants manufactured a defective, unreasonably dangerous product that proximately caused this lady's injuries.

Now, we're allowed to get into these things without Mr. Motley getting up and jumping up and down every 15 minutes saying we opened the door to something else or he needs a limiting instruction.

MR. HOWARD: Just one more comment. That's a word game, "inconsistencies." They tried to show an inconsistency because it was incomplete, that it didn't contain information that wasn't required, and that's the very point of it. They tried to use something; they knew it wasn't required. And for them to show, try to use that document to impeach our witness by showing an inconsistency because it didn't have that information in it. It wouldn't have had

that information in it. It would not have been pertinent to those proceedings. That's all I have.

MR. MOTLEY: I'm afraid to jump up, Your Honor, for exercising Mr. Wagner. He causes me great consternation.

THE COURT: The request essentially is for the Court on paragraph 29 of my order in limine regarding the FECA claim. Motion in limine was granted. The request is that that be lifted and also for a limiting instruction.

I don't think the cross-examination today has opened that area, so I'm going to decline your request, Mr. Motley, and the original motion in limine order will stand. I may, however, take another look at that if and when I think it deserves that. Thank you, Counsel. See you at 1:15.

(Lunch recess was taken.)

MR. CASSELL: All rise.

(Jury present)

THE COURT: Be seated. All right. Jury appears in its entirety, together with

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the alternates.

The witness here, Counselor?

MR. CROSS: Yes, Your Honor, she is.

THE COURT: Just have a seat, ma'am. Would you tell us your name again.

THE WITNESS: Beth Kreider.

THE COURT: Ma'am, you recognize you are still under oath?

THE WITNESS: Yes, sir.

THE COURT: All right.

MR. CROSS: Thank you, Judge.

BY MR. CROSS:

Q Mrs. Kreider, just before we broke for the noon recess, we were about to go into the subject of the nature of your work in the supply department at the VA Hospital. Just to reorient you to that subject, and the Court as well, you were in supply from approximately 1978 to 1990, give or take?

A Something like that, yes.

Q And once again, how many of those years were you the supervisor?

A Probably nine or ten.

Q Now, if you would, please, could you describe for the jury what involvement you

would have in the capacity of a clerk and then as a supervisor in the supply department with regard to cigarettes.

A As a supervisor, nothing, because cigarettes were gone from the department before I became supervisor. When I went into supply, and I can't tell you why or how they got there, but the VA had a program for indigent patients where they furnished personal care items and things for the indigent patients who did not have funds to buy their own, and somehow those were assigned to our department, and along with their supplies, like the electric raisers, toothpaste, things like this that they didn't have funds to buy, there were cigarettes given to those patients as well, and those were assigned to medical supply.

They did not come out of our medical supply funds, but we were responsible for dispensing those to the indigent patients.

Q And did you, when you say dispensing, what exactly would be your involvement in the distribution of cigarettes?

A There was a hospital, what we called a G and

L sheet, gain and loss sheet, that came out on a daily basis, telling us how many patients were on the unit, how many they had gained, how many they had lost, how many of those were indigents, how many were service connected and things like that.

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And we took an average for the month for the number of indigent patients that were assigned to a ward and dispensed so many packs or cartons of cigarettes to each unit depending on the number of indigent patients they had for the month.

Q So was there a central warehouse or some building on the complex where cigarettes were stored during this time?

A Yes. The VA had a supply warehouse where supplies were stocked for all the departments of the hospital. That was another section of supply service. And the cigarettes were stocked there, both for us to issue to the indigent patients and for the canteen to sell in the canteen.

Q Okay. And what do you know about the sales of cigarettes from the canteen?

A In the early years that I was there,

cigarettes were much cheaper for the patients to buy at the canteen than they were to buy off of the hospital grounds. Later on, they came, you know, through with some law or policy, they came up with a price that they would make the price similar to what was in the community. Anyone that had funds of their own could go to the canteen and buy cigarettes. The cigarette -- the canteen was open to both staff and patients.

Q And did staff members buy cigarettes there?

A Yes.

Q Did you frequent the canteen while you worked there?

A Yes.

Q And did you have occasion to observe people buying cigarettes there?

A Yes.

Q What about patients who were unable to physically go to the canteen themselves, but still had money?

A The canteen had a cart similar to what general hospitals have, staffed by volunteer service, where they took a cart with

supplies, candy, cigarettes, gum, toiletries, things on a cart to the units to let them buy from that cart. The patients who were not able to handle money, they purchased what was called canteen coupon books for them. If they -- you know, if it was a patient who they thought might give his money to someone or lose his money, they had the canteen books. And the medical clerks kept those books and then when the cart came around, they were given the books to buy their supplies with.

Q So drawing your attention to the time period that you were involved in the distribution of cigarettes from the supply department,

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would you actually, you yourself, actually physically handle cigarettes?
A Right. I took the cigarettes to the units as a supply clerk.
Q And how often would you do this again?
A Usually we tried to do it once a month. But if patients were moved during the month, we might have to take them mid-month because the patient might have been, come in from outside or come from another building to a

building and not have cigarettes, so we tried to do it on a monthly basis, but sometimes that didn't work out.
Q Now, drawing on your observations, your personal observations of cigarettes being smoked in the canteen -- I'm sorry, being sold in the canteen, being smoked on the wards, you, as a nurse's assistant, in handing them out, and also your experience in supply, in distributing them to the various wards, did you have occasion to observe the various brands that were being sold and smoked in the Veteran's Hospital?
A Yes.
MR. OHLEMEYER: Objection, Your Honor, foundation as to time.
THE COURT: Sustained.
Q During the entire time that you lived -- or that you worked at the Veteran's Administration Hospital, did you have occasion to observe brands?
A Yes.
Q All right. And can you tell this jury what some of the brands are that you remember during the time period that you worked at

the VA Hospital?
A There were Winstons, Marlboros, Lark.
MR. OHLEMEYER: I'm sorry to interrupt, Your Honor. I think we still need some time specificity. The witness, I think, post-dates and predates the relevant time period.
THE COURT: I realize it might be difficult for her to distinguish particular years she worked there, so I think I'll allow the question, Counselor.
A You know, I'm sure that I can't name them all. I think when I had time without people sitting around and looking at me, I might have been able -- I think I gave in the deposition that I did, I gave them a list of cigarettes that I remember. All these were not sold at the canteen. I say this because I specifically remember one patient who smoked Winstons, and Winstons were not sold at the canteen. So he would ask different employees, visitors, anyone that he could, to bring Winstons in for him because he preferred that brand over others, and

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Winston was not sold in the canteen.

MR. CROSS: May I approach the bailiff, Your Honor?
THE COURT: Go ahead.
Q Mrs. Brewer, I'll hand you a document that's been marked for purposes of identification only.
MR. OHLEMEYER: Excuse me, Your Honor.
Q Exhibit 24. Plaintiffs' Exhibit 24. Have you seen this document before?
A Yes.
Q Does this contain a list of the cigarettes that you might have sat down and compiled at a time when people weren't looking at you?
A Right.
Q All right. Would you take a moment and refresh your memory as to some of the brands that you previously identified.
A Malibu, Pall Mall, Kent, Newport, Doral, Kool, Marlboro, Camels, Lucky Strikes, Old Gold, True, Chesterfield, Salems, Vantage, Winston, Eve, L & M, Larks, Benson and Hedges, Cambridge, Merits, Parliament, Philip Morris, Players, Virginia Slims and Bell Air.

Q And as you sit here today, Mrs. Kreider, are you of the opinion that each and every one of those brands was sold or smoked at the VA Hospital during the time of your employment?
A Probably these and others that I don't remember.
MR. CROSS: Pass the witness, Your Honor.
THE COURT: I'm not sure she answered your last question. His question was were all those brands sold at the hospital.
A He said -- I understood him to say sold or smoked.
THE COURT: What was your question?
MR. CROSS: Greg, sold or smoked. I'm sorry, sold or smoked.
THE WITNESS: Yes.
THE COURT: All right. Thank you. Mr. Wagner?
MR. WAGNER: Thank you, Your Honor.

CROSS-EXAMINATION
BY MR. WAGNER:
Q Mrs. Kreider, you and I met before at your deposition?

A Yes.
Q You have a husband and you're recently married; is that right?
A Correct.
Q And he's a smoker?
A Well, he was.

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Q Did he quit?
A He's trying.
Q He's trying but he still smokes.
A Very little, and he doesn't smoke in the house anymore. He's -- but that's a personal matter with him.
Q Let me ask you a couple of questions, first of all, about the VA Hospital itself where you worked for a number of years, okay? The buildings, how it's laid out and all that, kind of bear with me here for a minute.
And we asked you some of these questions at your deposition. There were -- you worked in about 13 or 14 disconnected buildings; is that right?
A Probably at least that many, yes, that housed patients.
Q 13 or 14 disconnected buildings that housed patients; right?

A Right.
Q And there were also buildings that did not house patients; right?
A Right.
Q There was a canteen building that didn't house patients?
A Right.
Q There were supply offices that did not house patients; right?
A Right.
Q There was a warehouse that did not house patients; right?
A Right.
Q There was a gym and a bowling alley that didn't house patients?
A Right.
Q Administrative offices that did not house patients?
A Right.
Q Recreation, voluntary service, chaplain services, all those buildings did not house patients; right?
A Those departments didn't house patients. Now, some of those departments might have had offices on patient units.

Q Okay. Some of the buildings in that Veteran's Administration complex were buildings you'd go to for committee meetings; right?
A Right.
Q And so if you were, for example, a member of a particular committee, you might go, for example, to the administration building for a committee meeting; right?
A Yes.
Q And there was also an education building?
A Yes.
Q Where a lot of the meetings and seminars were held?
A Yes.

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Q And there was also a patient and employee's library; isn't that right?
A Right. There were in two separate buildings, separate libraries.
Q There was a patient library?
A And staff library.
Q And staff library. They were separate.
A Right.
Q And while you were worked there, a major remodeling of Building 16 took place, didn't

it?
A Major remodeling of a lot of the buildings took place, but 16 was included, yes.
Q 16 was included, wasn't it? And in that major remodeling, walls and panels were put in?
A Yes.
Q And they put in what you call a three-way air system; right?
A Right.
Q And at that time, they moved the patients and staff to another area?
A Correct.
Q And they revamped both the first and second floors?
A Yes.
Q And then there came a time when there were no patients on the third floor in Building 16; right?
A Right.
Q And in addition to that major renovation, there were minor renovations in Building 16 from time to time; right?
A Right.
Q Where they removed, changed ceiling tiles?

A Yes.
Q And lowered the ceilings or put in new showers, that sort of thing?
A Correct.
Q And in connection with that major remodeling, they piped in oxygen air and a suction system in the patients' rooms; right?
A Right.
Q So if a patient needed oxygen in his room, you could tap into that oxygen supply; right?
A Yes.
Q You have to answer -- did you answer out loud?
A Yes.
Q Okay, thank you. And you recall actually that there was asbestos that was used in the Veteran's Administration Hospital; right?
A Well, I don't recall the asbestos being put in but there were asbestos removal projects where the areas were partitioned off and blocked off for asbestos removal.
Q Okay.

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25 A The asbestos was probably put in long before

1 my time.
2 Q Okay. I want to talk about your work there
3 at the Veteran's Administration Hospital
4 too, Mrs. Kreider. You began in 1976 at the
5 Veteran's Administration Hospital; right?
6 A Yes.
7 Q So that would have been three years after
8 Mildred Wiley began working, if she started
9 working in 1976.
10 A If she started working then. I didn't know
11 when she started working, though.
12 Q Well, the jury has heard she started working
13 in '73, so that would have been three years
14 after she started working. And you didn't,
15 as I understand of course, work the entire
16 18 years or so that you worked for the
17 Veteran's Administration as a nursing
18 assistant.
19 A No.
20 Q You worked in medical supply. And when you
21 first started in 1976 at the Veteran's
22 Administration Hospital, you actually worked
23 in Building 138, didn't you?
24 A Right.
25 Q And that was a long-term geriatric care-type

1 unit?
2 A Yes.
3 Q And then after that you worked in other
4 buildings from time to time.
5 A Yes.
6 Q And you actually don't have any recollection
7 of working in Building 16 until about 1980
8 when you began working in medical supply;
9 isn't that right?
10 A Right. If I worked on Building 16 before I
11 went into medical supply, it was just for a
12 shift occasionally to pull relief when I was
13 reassigned.
14 Q Okay. But the point is that when you --
15 your first recollection of being in Building
16 16, being around 1980, that was -- assuming
17 Mrs. Wiley started working in 1973, that
18 would have been seven years after she
19 started working.
20 A Right.
21 Q And when you worked as a nursing assistant,
22 you worked days for a period of time, and
23 then you'd work nights and evenings; right?
24 A Right.
25 Q And you rotated on all those shifts from

1 1976 to 1980 while you were a nursing
2 assistant; right?
3 A Right.
4 Q And that's because that's what all the staff
5 nurses and the nursing assistants had to do;
6 right?

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A No. Yes and no. The nursing assistants who were permanently assigned to second or third shift only came on day shift for seminars and training classes that were held on days. But if you worked days, you rotated to all shifts.
Q Well, it's fair --
A Did I clarify that at all?
Q Well, probably.
A Most -- some people did not rotate. If they were permanently assigned to a second- or third-shift position, but it didn't matter if you had been there for 20 years, if you were assigned to day shift, you did rotate to pull relief on other shifts.
Q You and I can agree that generally speaking, most of the nurses, most of the nursing assistants rotated day, evening, night?
A Well, it would be approximately a third,

because it would be the day shift rotated, but the other shifts didn't routinely.
Q Now then, in 1980, you began, or about 1980, I think you were not quite sure of the exact date when you started in medical supply -- was it 1980?
A I don't really remember the dates.
Q Okay. And whatever that date was, and I think you told us in your deposition you thought it was 1980. Would that be pretty close?
A That's reasonably close to the time.
Q And you worked then in medical supply from 1980 until about 1989 or 1990; something in that area?
A Right.
Q Is that right?
A Right.
Q And you became a supervisor of the medical supply department then in about, let's say, 1981 or so; right?
A Right.
Q And the medical supply building -- excuse me, the medical supply department was not in Building 16, was it?

A Not at that time, no.
Q It was in the basement of Building 138?
A Right.
Q And during the entire time that you worked in the medical supply department, you worked days and you had weekends and holidays --
A Right. Off.
Q -- off. That's right. And up to the time that Mrs. Wiley became the head nurse, since she was a staff nurse, she would have rotated on all these other shifts we're talking about, days, evenings, and nights; right?
A Yes.
Q And when you transferred then to Building 16

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as a nurse's assistant, which was about, what, 1989, 1990?
A Right.
Q At that time Mrs. Wiley was the head nurse.
A She either was the head nurse or became the head nurse around that time. I don't know if she was head nurse when I went or assigned shortly after.
Q Well, we heard --
A She was on that building at that time.

Q I think we've all heard a lot of evidence before you got here that she became the head nurse about 1985. And so when you went back to Building 16 as a nursing assistant, Mrs. Wiley, as a head nurse, worked days; right?
A Primarily, yes.
Q And you worked the second shift during that period of time; right?
A Not all the time, but as much as I could I did. I was not assigned to second shift, but I pulled as much of the relief and staffing on that shift as I could.
Q All right. But Mrs. Wiley, then, during that period of time that you were there in Building 16, from about 1989 or 1990, up until the time of 1991 when Mrs. Wiley fell sick, you, for the most part, did not work days but she did work days; right?
A Right.
Q All right. Mrs. Wiley, as a staff nurse, would have been a member of committees and study groups; right?
A As a staff nurse and as a head nurse both.
Q But as a staff nurse, she would have been a

member of committees?
A Sure.
Q Sure. And committee meetings, the kind we're talking about here, were held in the administration building?
A It depended on how big or how small the group was and what the committee was. Sometimes they were held right on the nursing units.
Q Some of them were held in the administration building, though; isn't that right?
A Right.
Q Some of them were held in the education building?
A Yes.
Q And some of them were held in a building across the street from the hospital called the Credit Union Building?
A Right.
Q And some of these meetings and seminars -- strike that.
Some of the educational meetings that nurses went to were actually in places outside of Marion, Indiana; right?

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A I'm sure they probably were for nurses,

because some of mine were as, in supply, so, you know, I didn't keep up with where they went, but there were seminars that we got bulletins on that were not on the hospital grounds that they could apply to go to.

Q Some of the places that the nurses would go to for seminars included the Veteran's Administration Regional Training Center in St. Louis?

A Right.

Q And in Indianapolis?

A Yeah. I imagine.

Q Fort Wayne?

A Might have been a few at Fort Wayne. Fort Wayne was not that big of a facility that they had that many.

Q But they did go there from time to time?

A It's possible, yeah.

Q Now, in answer to Mr. Cross' questions about your work in the medical supply department beginning about 1980, you testified, I believe, that that department stocked cigarettes that were given to indigent patients; is that right?

A Right.

Q But isn't it a fact that a few months after you began working in the medical supply department, it stopped distributing cigarettes?

A It stopped sometime shortly after I started, yes, because we had a supervisor who did not think it was appropriate.

Q Okay. And a few months then after you began working there would have been a few months after you started working there in about 1980. So we can agree that in about 1980, then, that the medical supply department stopped distributing cigarettes; right?

A Right.

Q And you mentioned your knowledge about cigarettes being sold in the canteen; you remember that?

A Yes.

Q And were there cigars sold in the canteen?

A Yes.

Q Pipe tobacco was sold in the canteen?

A Yes.

Q Pardon me?

A As far as I remember, it was. I didn't use it, so I didn't buy it.

Q Okay. Let me switch over to another subject. You told Mr. Cross something about the condition of the patients in Building 16. Let me just go back over that for a moment.

You would describe those patients,

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would you not, as long-term care patients?
A Yes.
Q And they needed assistance for most of their daily needs?
A The majority of the patients did, yes.
Q Some were confined to their beds?
A Yes.
Q And some of them required feeding bags?
A Yes.
Q Some of them required restraints?
A Yes.
Q Some of them required catheters?
A Yes.
Q Some of them had to have diapers?
A Yes.
Q And many of them required oxygen that was piped into their units?
A Not a great deal of them required oxygen on a daily basis. It was just there for the

convenience of being able to give it to them without transferring them to medical if they developed pneumonia or something that caused them to need it for a while.
Q But some of the patients required oxygen; right?
A On occasion.
Q And not all those patients smoked, did they?
A Probably not.
Q And of those patients that smoked, they could only smoke during certain times; isn't that right?
A Now, are we talking about the last couple years when I worked in nursing on that unit or are we talking about the entire time?
Q Well, I'm talking about your testimony about what you remember you saw during --
A When I was working in medical supply delivering supplies to the unit, the patients were allowed to smoke on the building. And the majority of them probably did smoke.
Q Okay. I understand that. My question is, that there were times when those patients could not smoke; isn't that right?

A Yeah. If they were in bed, they couldn't smoke in the rooms.
Q Well, do you remember telling us about that in your deposition? That there were times, apparently, when the patients could not smoke?
A Yes.
Q Okay. And I think you told us that in the later years that you remember in Building 16 about two-thirds of the patients on that floor, on the first floor, were bedfast with tubes. Remember that?
A Yes.
Q And smoking was not allowed in the patients' rooms; correct?

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A No. But when I talk about a bedfast patient, I'm talking about a patient who is non-ambulatory and cannot get out of bed on his own. He may be got out of bed and taken to other places in the hospital. It doesn't mean -- when I talk about a bedfast patient, in my work, I'm not talking about somebody that never gets out of their bed.
Q Sure, I understand that.
A Okay.

Q And while you were still working in medical supply during those years, smoke eaters were installed at most of the buildings at the Veteran's Administration Hospital; isn't that correct?
A Yes.
Q And that was a big apparatus that would suck the smoke up?
A It was supposed to. If they were large enough for the area, they would work. If they weren't large enough, they didn't -- weren't too successful sometimes.
Q Well, in fact, you recall, do you not, that in Building 16 those smoke eaters were installed in the first floor day room?
A Yes.
Q Smoke eater was installed in the second floor day room in Building 16 also; isn't that right?
A Yes.
Q And you recall that there was a no-smoking policy instituted in the 1980s sometime; correct?
A Sometime in the late '80s yes.
Q In connection with that no-smoking policy,

no-smoking signs were posted in the canteen?
A Yes.
Q And no-smoking signs were posted in some other places in Building 16; right?
A Right.
Q And, in fact, you remember because your husband tried to get the no-smoking policy in the canteen lifted; right?
A That's right. Through his veteran's organization.
Q And each building there were areas where staff employees and visitors could no longer smoke; correct?
A Correct.
Q And you remember when Mildred Wiley had an office?
A Yes.
Q She had an office when she was head nurse?
A Yes.
Q And Mildred Wiley did not allow smoking in her office, did she?
A No.
Q In fact, there were no ashtrays in her office, were there?

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A No.

Q You don't recall ever hearing Mildred Wiley saying she wanted to transfer to a different part of the hospital from Building 16; isn't that correct?
A I don't remember her ever discussing that.
Q And you don't have any recollection that Mrs. Wiley ever complained about smoking in the Veteran's Administration Hospital, do you?
A Mrs. Wiley didn't do a lot of complaining. So I don't remember her --
Q But you don't have any recollection that she --
MR. MOTLEY: Excuse me, Your Honor. He's talking over the witness.
MR. WAGNER: Mr. Motley is correct.
THE COURT: Did you finish your answer, ma'am?
A Yes. I don't remember her complaining about anything.
Q In fact, you also never complained about the smoke; isn't that correct?
A I probably complained about anything I could complain about.
Q Remember telling us in your deposition you

never complained about the smoke?
A Not specifically, I didn't complain about it.
Q And you testified about having to help the patients smoke every once in a while; is that right?
A That was part of our job.
Q That was part of your job there. And since you were not a smoker, didn't Mrs. Wiley give you the opportunity to avoid helping the patients smoke?
A Yes. She told me if it didn't upset me and bother me, you know, she wouldn't assign that to me any more than necessary to cover herself with the unit. That she would assign that to other people who were smokers.
Q She told you that she would assign that duty to other people who were smokers because the smokers liked to help the patients smoke so they could smoke; right?
A Sure.
Q I want to talk to you about your testimony about the brands of cigarettes that you remember being sold or used at the Veteran's

Administration Hospital; okay? Just want to go back through that a little bit.
A Okay.
Q You with me?
A (Affirmative nod)
Q All right. That subject came up in 1997

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when you talked to Mr. Max Howard and Mr. Cross at lunch one day; right?

A It came up that day, but it had also been discussed back in May of '93, when Mr. Howard had talked to me at the hospital.

Q Well, let's go back to that then for a minute. In 1993, Mr. Howard came out to the Veteran's Administration Hospital, and he and some other attorneys began interviewing people there at the hospital; right?

A Right.

Q And you were one of those people that got interviewed.

A Right.

Q And then you didn't talk to Mr. Howard about that subject again from 1993 until 1997; right?

A No.

Q No, that's not correct?

A No, I did not.

Q No, you did not, all right. And then you met Mr. Howard and Mr. Cross for lunch in October of 1997.

A Right.

Q Was Mr. Motley there with you at that time?

A No.

Q Do you know who Mr. Motley is?

A No.

Q And then at that lunch, Mr. Howard read to you a list of cigarette brand names, didn't he?

A He showed me notes that he had taken from our previous meeting that had a list on it that I had given him.

Q Well, actually he never showed you the list, did he? He just read it to you.

A He read it to me.

Q But you didn't see the list.

A That he had?

Q Yes, ma'am.

A No.

Q All right. Now, in this affidavit -- in this paper that you brought here today, and your testimony here before the jury that

you've related the brand names, I was counting those up and there were 26 of those. Right?

A I never counted them.

Q Well, I just counted them. And there are a list of 26 different brand names; right? And that's pretty good memory feed, isn't it?

A Well, probably what I did was named the cigarette brands that I was familiar with and that I had seen people smoking, because that's the only place where I was usually around very much smoke, except for what my husband smoked at home, and he smoked Vantage.

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Q It's correct, isn't it, Mrs. Kreider, that you have no recollection of a specific incident when each of the brands you've identified were smoked in Building 16; correct?
A Correct.
Q And you have no recollection of specific patients smoking specific brands in Building 16, do you?
A Some patients I could probably name specific

brands they smoked, but I think I told you in the deposition that that's not something I paid attention to, because the girl that I regularly worked with, I don't even know what brand she smoked. I was with her on a daily basis.
Q But you remember telling us in your deposition that you had no recollection of specific patients smoking specific brands in Building 16. Right?
A I remember telling you that I don't remember seeing patients smoke specific brands in the presence of Millie, but, you know, I may have said Building 16.
Q Okay. And you don't have any recollection of the brands smoked by staff members in Building 16 either, do you?
A Not specific people and specific brands, no.
Q And you don't know what brand of cigarettes all the visitors that came to the hospital smoked, do you?
A No. But if visitors came in and smoked them, the patients probably smoked them because they would ask visitors for cigarettes.

Q And when Mr. Howard and Mr. Cross contacted you in October 1997 and talked to you about this list of 26 brands of cigarettes, that was about three years after you had retired from the Veteran's Administration, wasn't it?
A It's three years after I left. I did not retire. I resigned.
Q All right. It was about three years after you had left the Veteran's Administration Hospital.
A Right.
Q And if the record in this case shows that this lawsuit was filed in 1993, it would have been over four years after this lawsuit was filed; right?
A Yes.
MR. WAGNER: I think that's all I have, Your Honor.
THE COURT: Mr. Ohlemeyer.
MR. OHLEMEYER: Just a couple.

CROSS EXAMINATION
BY MR. OHLEMEYER:
Q Mrs. Kreider, my name is Bill Ohlemeyer. I

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just have a few questions for you.

You told Mr. Cross before lunch about a patient that you apparently had told Mr. Cross about before this morning. Remember that discussion?

A Yes.

Q And you told us about -- the way that patient smoked cigarettes.

A Yes.

Q I'm correct, though, that you don't know if Mrs. Wiley ever had to have that same experience with that patient or had to deal with that patient?

A I couldn't say yes, she did, but I couldn't say no, she didn't, because part of the nurse's job also was helping the patients to smoke, the same as the aides were.

Q But am I correct that page 19, Counselor, you were asked this question, you gave this answer at your deposition, in connection with a discussion of that patient:

"Question: Do you know if Mildred Wiley ever had this same experience with the patient?

"Answer: No, I don't."

A No. I only can be responsible for what I

do. I don't keep track of what everybody else does.

Q I understand. Your husband used to be a regular smoker?

A My present husband, yes.

Q Present husband. He would smoke in your house?

A Yes.

Q In the car?

A Yes.

Q There would be times where you would be spending time with him and he would be smoking in your presence?

A Yes.

Q Do you know how many cigarettes he would have to smoke before your hair or your clothes would smell like cigarettes, ma'am?

A No. I don't really know.

Q More than one?

A Well, probably more than one at our house because I have Hepa air filters going all the time, so that helps take that out of my house.

Q How about in the car?

A We usually have the vents open and the air

on, even in the winter.

Q Mrs. Wiley was the kind of person that would let you know if she was unhappy about something you were doing at work; isn't that right?

A If it was job-related, yes.

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MR. OHLEMEYER: That's all I have. Thank you.
THE COURT: Redirect, Mr. Cross?
MR. CROSS: Yes, Your Honor. Thank you.

REDIRECT EXAMINATION
BY MR. CROSS:

Q Mr. Wagner asked you a number of questions about committee meetings and education building and administration building and so on. When you saw Mildred Wiley during the time, during those long years you worked in supply, where would you see her at?

A Most of the time that I saw her would be on the building, on Building 16, because it would be when I was talking with her about supplies, in general, or about evaluations going on with supplies that were being done on that building or something.

Q And can you, just so that we're clear on this, could you tell the jury again approximately how many times you would -- you believe that you would have encountered her in Building 16 during those years each week?
MR. WAGNER: Asked and answered.
MR. CROSS: I'm entitled to clarify.
THE COURT: You can tell us.

A Sometimes I might be on that building four or five times in one day, but I was always on it maybe eight or ten times in a week. And if -- since she was normally a day nurse, I would probably see her when I was there. Whether I was specifically meeting with her or not, you know, I possibly would see her.

Q Do you recall about how often you might have gone to Building 16 for some reason or another and not seen her there on the floor?

A No. Because it would vary as to whether she was working A or B floor, which was first and second floor. Or, you know, whether I was -- probably I would see her because even

if she was in her office, you walked by her office to get to the nurse's station.

Q Now, Mr. Wagner asked you a question about there being asbestos at the Veteran's Administration Hospital and the occasions when it might have been removed. You don't ever recall any asbestos removal taking place in regards to Building 16, do you?

A No, not specifically.

Q And those -- and those few instances when you did happen to see that in one of the other buildings -- could you describe what measures were taken by the people that were doing that work?

A Well, I also sat, as supervisor of central

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supply, I sat on the infection control committee, and the safety committee, and it was always petitioned off. And even the door, if it was coming off of a corridor where there was a closed door, they would always build maybe a foot or two out from that door. Leaving enough room for the door to open, but they would build out with plastic and wood framing to partition it off so that they would go into that little

enclosed area before they opened the door into the big area where they were doing removal, and that was just standard procedure, wherever there was asbestos removal going on. They would partition it off and it was a restricted area and no one was allowed in it except the workers that were involved.

Q Would you have ever seen a cloud of asbestos then come up from the place where that work was being performed?

A No.

Q There were clouds of smoke in the building, were there not?

A Yes.

Q Now, you testified that the supervisor who was one of your predecessors in the supply department thought it wasn't appropriate that cigarettes be distributed out of the medical supplies department; was that your testimony?

A Right. Well, he didn't think any of the indigent supplies should be kept there because they weren't medical supply items.

Q But prior to that time, cigarettes had been

treated just the same as if they were medical supplies?

A Except that they were not bought out of our budget. They weren't funded from our medical supply budget, but they were stored and stocked in that department, yes.

Q And how did it come about that cigarettes were distributed -- strike that.

After that change was made, were cigarettes still stored in those warehouses you talked about?

A Cigarettes were still stored in the warehouse and sold at the canteen, yes. Whether free cigarettes stopped at that time, the indigents' cigarettes stopped at that time or were assigned to another area of the hospital, I really don't remember.

Q But after that change in the way they were processed through the system at the Veteran's Administration Hospital, did you notice that the level of smoke present in the buildings declined at all?

A No. Not that I recall.

Q Okay. Now, back to the cigars and the pipe

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tobacco that was sold in the canteen. You

answered a question of Mr. Wagner's that you did observe that that was going on?

A Yes.

Q Did you -- are you familiar with any brands of pipe tobacco that were sold in the canteen?

A No.

Q Have you ever seen the brand Sir Walter Raleigh pipe tobacco?

MR. WAGNER: Objection, Your Honor, leading, suggestive.

THE COURT: Sustained. She's answered it.

Q You said that -- you answered some questions in response to these gentlemen about the measures that you take to ventilate your home and when you let your husband smoke there and in your automobile?

A I don't let my husband. He chooses to do that.

Q Okay.

A I don't tell him what to do. I don't think he's in here, but don't get me in trouble at home.

Q You realize that this is -- this will be a

public record?

A Yeah. But I don't think anybody knows him that's in here.

Q There's a couple of newspaper reporters back there. You sure you want to --

A He doesn't read the paper.

Q You may dodge that one then.

You did say some things about that, though. You mentioned your husband had had a complaint about, some kind of complaint, being able to smoke; he thought he had a right to. I just want to make sure that that is not your present husband; is that correct?

A No. When we were talking about my husband helping, fighting through the veteran's organization, my former husband, who is deceased, was president of an American Legion post, and he was not even a smoker at the time that he was doing that. He had quit because he had chronic lung problems himself, but he felt that since that was those veterans' home, they had a right to, when they went to the canteen, to have a cup of coffee, they had a right to have a

cigarette if they wanted to. And through the American Legion organization he helped to try to get them as many rights as he could, even though at that time he was not a smoker himself.

Q So just to be -- along the same lines, we're

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clear on another point, when these restrictions on smoking were instituted in the late 1980s, these pertained to employees only, did they not?
A To begin with, yes. Later on, I think there were probably restrictions placed on patients' smoking in buildings, but to begin with, it came down on the employees before it did patients, yes.
Q When did the restrictions on patients themselves go into --
A I really don't remember.
Q Was it -- do you have an idea as to when it was relative to when you resigned?
A Well, there were some patient areas still in the buildings where smoking was when I left the VA in '94.
Q 1994?
A Right. The patients could still smoke?

Certain areas but not employees.
Q Now, you stated that you resigned instead of retired?
A Right.
Q What is the difference?
A I basically quit, but I resigned due to personal reasons that would affect my retirement income in later years because of being an older, in years, federal employee, and I was under the civil service program, yet I had also taught school and worked under Social Security; and it would have affected my retirement income had I remained at the VA and retired under the program that I was under.
Q So it had to do with -- it didn't have anything to do with you getting mad at anybody?
A No.
Q Or leaving?
A It was financial reasons for my future years when I get old.
Q Okay. Now, Mr. Wagner asked you some questions about smoke eaters.
A Right.

Q And he talked to you a little bit about some of your deposition testimony in that regard. Did these smoke eaters make much noise?
A They were very noisy. The TVs would have to be turned up for the patients who were watching TV to be able to hear if the smoke eaters were on.
Q And did this cause any problems in your experience, the fact that they were noisy?
A Well, it caused gripey patients sometimes or complaining staff, but --
Q Did the smoke eaters dispel all the smoke that was generated in that building?
A No. No.
Q Did you notice whether or not the smoke

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eaters did any good at all?
A They did remove some of the smoke, and particularly, if you could encourage the patients who were smoking to congregate in the area of the smoke eater. But that wasn't always possible because of the size of the geri chairs and the chairs they were sitting in. They couldn't all get real close to it sometimes.
Q And there was only one on each floor?

A There was usually one smoke eater in a room, yes.
Q Do you recall when those were instituted?
A No, I really don't.
Q Now, you stated in response to a series of questions from Mr. Wagner that you could not recall specific incidences where specific patients would smoke specific brands, and I just want to clarify that point because I believe on direct examination, when I asked you earlier, you mentioned --
MR. OHLEMEYER: Excuse me, Your Honor. I object to this question as framed.
MR. CROSS: How do we know what it is until I finish it?
MR. OHLEMEYER: Well, because you can't repeat testimony as a predicate to a question in a leading fashion.
THE COURT: I agree. Rephrase it, Counselor.
Q Would you tell the jury again about the indigent patient who wanted a particular brand that was not purchased at the canteen?
MR. OHLEMEYER: Now, Your Honor, based on the cross-examination, I object to

this lack of foundation, relevance, because this witness didn't connect it to Mrs. Wiley.
MR. CROSS: That wasn't the question Mr. Wagner posed. He got her to say that she couldn't recall any specific instance of a specific cigarette being smoked by a specific patient, and she testified to the contrary. I could have stood up and objected at that time.
THE COURT: I'm going to sustain the objection.
Q Once again, let me ask you a very simple question. What specific memories do you have of particular brands being smoked by particular patients during your tenure at the VA?
MR. WAGNER: Your Honor, okay, this was all gone into on direct examination. She's already testified what her memory is of this subject.
THE COURT: I think we've been over that a couple times already.
MR. CROSS: All right, as long as

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the record is clear.

Q This gentleman that we talked about on direct examination, the paraplegic Vietnam veteran, was he the kind of patient you would refer to as a bedfast patient as you discussed with Mr. Wagner?

A Yes.

Q Were there many people like him who were either quadriplegic or unable to motivate or move around on their own?

A Yes. Quite a -- maybe -- I don't know. Maybe three out of 20 or something. Not a great deal that were in that severe condition that this particular patient was. There were probably some that could not motivate at all on their own.

Q And you personally assisted in the smoking of this gentleman; correct?

A Yes.

Q Do you know whether or not -- you testified in response to a question by Mr. Wagner you didn't know whether Mildred Wiley ever performed this function on this man.

A No.

Q Do you know whether Mildred Wiley was in the building when you were performing this

function on this man?

A I couldn't say that she definitely was.

Q All right. And how many, during your experience at the VA, how many times would you have -- did you do this -- did you help this man with this smoking every day in your experience?

MR. WAGNER: Your Honor, seems to me this is just repetitious stuff that we've gone over.

THE COURT: I believe so. Sustained.

Q Has it been difficult for your husband to quit smoking?

MR. OHLEMEYER: Objection, Your Honor. Relevance.

MR. WAGNER: Objection, Your Honor. Irrelevant.

THE COURT: Sustained.

MR. CROSS: Pass the witness.

THE COURT: Mr. Wagner, anything else?

MR. WAGNER: I have no further questions.

THE COURT: Mr. Ohlemeyer?

MR. OHLEMEYER: I have nothing, Your Honor.

THE COURT: Thank you, ma'am.

Call your next witness, Counsel.

MR. MOTLEY: Your Honor, we move to introduce Exhibit 33608 at this time against

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the members of the Tobacco Institute. May I pass Your Honor up a copy?
MR. WAGNER: Your Honor, we're going to need to be heard on this outside the presence of the jury.
THE COURT: We have not dealt with that issue yet?
MR. MOTLEY: No, sir, we haven't. It's one I placed on the list earlier; he raised a question I wanted to address.
THE COURT: How many are you going to offer?
MR. MOTLEY: Just this one right now.
THE COURT: Just that one? All right. Ladies and gentlemen, we need about five minutes. I'm sorry, but once in a while it happens.
(Standard admonition).

(Jury not present)
MR. MOTLEY: May I approach and hand Your Honor a copy of this?
THE COURT: Yes.
MR. MOTLEY: That has a yellow sticker, I'm told, Your Honor. We premarked it so as not to take up the Court's and clerk's time in marking these things.
THE COURT: All right.
MR. WAGNER: Judge, I don't mean to interrupt Mr. Motley, but we've already argued this exhibit. It was offered before and rejected by the Court.
MR. MOTLEY: I don't remember such as that.
MR. OHLEMEYER: That's why it's not marked.
MR. MOTLEY: We premarked all of these, sir, to save time. I suggest you get a different scribe than the one you've got back there.
THE COURT: It was marked, Counselor, but not argued.
MR. MOTLEY: You told us to revisit this, Your Honor. I brought it up at

sidebar; you told us to revisit this document.
This document goes to the issue of the defendants' efforts to use the veteran's organizations as stalking horses to keep smoking going on in the Veteran's Administration hospitals. And now that Mr. Wagner has asked a specific question about veteran's organizations, I wish to offer it.
At the time you told me that it had nothing to do, I believe, with the witness that I was addressing. You never said I couldn't bring this document back up again.
THE COURT: I have it.

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MR. OHLEMEYER: Mr. Motley did offer the exhibit.
MR. MOTLEY: Through a witness, Your Honor.
THE COURT: Through Dr. Roggli.
MR. MOTLEY: Roggli, yes, Your Honor. Now, they've raised the issue, Your Honor, specifically to this witness about veteran's organizations, and I would respectfully ask Your Honor to look at --

these things don't have pages on them, or if they have pages, you can't read them. So I have to give you the Bates number, Your Honor.
THE COURT: All right.
MR. MOTLEY: And I specifically refer Your Honor to Bates Nos. 2731, 2732, 2736, 2737, and, Your Honor, that this -- essentially this is what I call the stalking horse document, where the Tobacco Institute was using veteran's organizations as a stalking horse to keep smoking allowed in Veteran's hospitals, and that's what this document addresses.
And now that the defendants have raised this as an issue in cross-examination, I believe it's seasonable and fair for us to move to introduce it at this time and publish it to the jury. That's, in essence -- that's, in fact, what it says, Judge, and they objected to it at the time, I believe, amongst other reasons, on relevance and foundation. Now that they've raised this, I don't -- this was produced in files, Your Honor, of the Tobacco Institute

itself, it was an address by the chairman of RJ Reynolds, and on the back it tells us who all was there.
On page 38, the distribution is set forth on page 38, distributed to the Tobacco Institute, to Covington & Burling who represents the Tobacco Institute, Chadbourne & Parke, who represents American Tobacco Company, to Philip Morris, to RJ Reynolds. Remember Mr. Sheffler, he's -- and Shook Hardy & Baccon, that's Mr. Ohlemeyer's law firm.
And then further, Your Honor, at the bottom there's some blind copies on page 39. I can describe who those people are if you'd like. I don't know how they can ask questions of these witnesses about what veteran's groups did, Your Honor, and not make these things relevant in our case in chief.
THE COURT: All right. The document is reoffered. Defendants care to be heard?
MR. WAGNER: I do, Your Honor. We

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seem to be really stretching for reasons to

get some documents in. The question, as Your Honor heard, is probably going to try your patience repeating it, but substantively this witness remembered that there was a time when the canteen at the hospital stopped selling cigarettes. And the question simply was, do you remember that because your husband was involved in an effort to get that smoking restriction lifted, and she volunteered, yes, he was and he went to, I think she said -- what did she say? American Legion or Veteran's Administration or something; one of the local places here, or rather in Marion, Indiana; one of the local legion clubs or whatever and tried to get them to allow the veterans to smoke there. That was the long and short of it.

Now, how all that, when reopened this exhibit as consideration by the Court again, after all the objections that were made here before, I don't have the slightest idea. But this document, you know, there are a number of reasons why it's objectionable.

First of all, it's a briefing. It

doesn't show that anybody said anything. It shows on its face that it's a briefing of a gentleman who apparently was going to give some sort of a speech. It's got a 1989 date, it's irrelevant to anything in this case in terms of time, and it essentially discusses petitioning the federal government by a number of different ways and lobbying, all of which were constitutionally protected, which we argued before. It doesn't identify any person who said anything.

Its author is not even identified, so there -- I mean, there are a gazillion reasons, Your Honor, why this document ought not to be admitted. Your Honor turned it down, the offer of admission of this document before, and I guess I have to say it's really stretching it now for Mr. Motley to stand up here and say somehow or another we ought to go back and revisit this again, get the jury out of the room, go over this document all over again, delay this trial for another 15 minutes to an hour or so while we reargue something that isn't worthy

of being reargued.

MR. MOTLEY: Your Honor, gazillion, whatever that is, frivolous reasons don't make a substantial one. And if we want to get into who is wasting the Court's time, I could make reference to the windiness of

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Mr. Wagner's objections.

But, Your Honor, they knew -- they asked this lady these questions in the deposition. They knew what the answer was going to be. And, Your Honor, Dr. Roggli was an expert witness. I don't have the transcript, exactly what you said, but you never foreclosed me, if I recall correctly -- I don't have the transcript in front of me -- every document is not relevant as to every witness. We didn't offer this document with this witness. I offer it now.

Standing by itself, it's relevant, Judge. And as far as this lobbying, there's no such thing as an immunization's of evidence. There's an immunization of claims based on public advocacy. You never ruled any differently from that; you just ruled

with respect to the 1994 testimony of these CEOs.

MR. OHLEMEYER: If I may, Your Honor, very briefly.

THE COURT: Mr. Ohlemeyer.

MR. OHLEMEYER: The first three words of this document are, "Thank you, Bob." The last word is "Sam." We don't know who Bob is; we don't know who Sam is.

MR. MOTLEY: I do.

MR. OHLEMEYER: You know, Mr. Motley -- Your Honor, I apologize. But at some point if Mr. Motley wants to take the stand and raise his right hand, we'll see how much he knows and how much can be confirmed and corroborated. At the present time we're dealing with a document that describes contact with the veteran's organization. The best evidence of what happened in the VA is the VA policies and procedures.

If Mr. Motley wants to put evidence on of that, he's free to do that. If he wants to bring somebody in from the VA to say we would have done this sooner but somebody

told us not to, he can do that. But this document doesn't get him where he wants to go.

MR. MOTLEY: Your Honor, we have Answers to Interrogatories, Sam is Sam Chilcoate and Bob is Bob Kloepfer, the vice president of the organization. But that's irrelevant. It's a speech by the president of RJ Reynolds, and in that regard, I don't know how people make a briefing unless they talk about something. Maybe they use sign language; I'm not sure.

MR. WAGNER: If this was a document, Your Honor, that was a published speech of some kind and we didn't know to

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whom it was given, and we didn't know who wrote it, and some of the other things Mr. Ohlemeyer has already pointed out that might elucidate some of these issues, but on its face this document would just be a mystery. The jury would have to speculate about what this document is all about, who said what to whom and all that.

And besides that, there is nothing in it that's any kind of admission of any kind.

I mean, it's a poor hearsay document, doesn't have any relevancy to this case.

MR. MOTLEY: Judge, the document is not hearsay if it's an admission against interest. I don't know where these guys get these hearsay objections, but it was produced from the Tobacco Institute files, it's a business record, it's stipulated authentic, and it's an 801(d) admission, if by nobody else but Mr. Johnston, Mr. Wagner's client, and by the Tobacco Institute. I'm sorry, Your Honor, I didn't mean --

THE COURT: Is there a stipulation that it's authentic from the Tobacco Institute?

MR. MOTLEY: Yes, sir, Your Honor, I'll get you that. And if they want to deny that, then I'll bring that in.

MR. OHLEMEYER: No, Your Honor, I don't think there's a dispute that it came from the files of the Tobacco Institute. That doesn't make it relevant until we know who Bob is and Sam is --

THE COURT: I know.

MR. OHLEMEYER: -- and why this was said and when it was said and whether any of that has any relevance to the issues this jury has to decide.

And, quite frankly, if there's anything about the Veteran's Administration that has to do with this lawsuit, it ought to come from either the Veteran's Administration files or from somebody connected to the Veteran's Administration.

MR. MOTLEY: Judge, that TI stamp that you see on the front --

THE COURT: I see it.

MR. MOTLEY: That is the pagination number by court orders that they have to place which files, defendants' files, it comes from and that's the accession number, and that's what that means. For them to stand up here and deny that that's authentic --

MR. OHLEMEYER: I did not, Your Honor.

THE COURT: No, he didn't deny it was authentic.

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MR. OHLEMEYER: I specifically said where it came from.
MR. MOTLEY: Mr. Wagner did.
MR. OHLEMEYER: My point is, you have to do a heck of a lot more than authentic something to have it admitted into evidence.
MR. WAGNER: I never said a word about authenticity, Your Honor. My objection rests upon what's in the four corners of this document. It doesn't take two minutes really to review it, Your Honor, to see that it's exactly what I described.
You know, and in response to Mr. Motley about what is hearsay and what isn't, there is an exception to the hearsay rule called admissions. But, you know, you get a document that says, I stared out at the moon and I thought to myself, or I surmised about something, or I had some mental musings of some kind, those are not admissions.
It has to be something that's a statement of fact, something that we could look at that the author said. The author has to be somebody that's an agent of the company, with authority to say it. All of

these elementary evidentiary things all have to be apparent on the face of the document if you don't have a sponsoring witness. This document fails on all scores, on all those steps.
MR. MOTLEY: Judge, those all go to the weight.
MR. WAGNER: They don't go to the weight.
THE COURT: I didn't hear what you said, Counselor, I'm sorry.
MR. MOTLEY: I'm sorry, I didn't stand up. He was still talking and I apologize.
THE COURT: Let me tell you what my thought is. 33608, I think it's probably been opened up on the relevance issue. But I think, in this case, with this document, there needs to be more evidence as to who Bob may be and who Sam may be.
MR. MOTLEY: Your Honor, if you look in the document, it says who they presented and distributed it to. I mean, if Bob was, you know, some jokester --
THE COURT: I've looked at it, and

I don't think there's enough there yet. There may be later on, you may be able to prove it.
MR. MOTLEY: Well, then I would like leave of the Court to take the deposition of the records custodian of the

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Tobacco Institute in this case. I'll do it sometime at the Court's convenience. Because they've produced it. We've taken depositions about this document. I don't know that anybody ever asked who Bob was or who Sam was.

I happen to know from the time period that Mr. Kloepfer was the vice president, Mr. Chilcoate was an officer, and they were both Tobacco Institute people.

I'm at a disadvantage in regard to that right now, Your Honor. I'll try to bring in -- but I'd like to go ahead and take the deposition. I can give you, Judge -- here is a document, the minutes of the Tobacco Institute identifies -- may I approach? I'm sorry.

THE COURT: Sure.

MR. MOTLEY: Mr. Chilcoate is the

president -- Sam Chilcoate is the president of the organization. I've already -- I'm sorry. I don't mean to get this close. I've already introduced documents of Robert Kloepfer. You've already admitted documents that show Mr. Bob Kloepfer was the vice president, and here's a report of Samuel Chilcoate, Your Honor, president of the Institute, just two years after this document is dated, if I might show this to you. And you've already introduced, Judge, that Mr. Kloepfer was the vice president during that period of time.

Judge, I can run, go take a deposition. I'd be delighted to get one more shot at these guys at the Tobacco Institute. It was liberated in Minnesota this week. If that's what you want me to do, I'll go do that, but I think we've got enough in the record, Judge, as to who Mr. Chilcoate and who Mr. Kloepfer is.

THE COURT: The next time we break, if your attorneys over there want to show me where it is in the record that I can determine who these people are, I will take

a look at that. But --

MR. MOTLEY: Yes, Your Honor.

THE COURT: It won't be admitted yet. 33608 not admitted at this time.

MR. MOTLEY: I take it that I've got a chance to bring it back up again despite what they said that you denied it before?

THE COURT: Absolutely.

MR. MOTLEY: Thank you.

THE COURT: Let's take five minutes, Counsel, and we'll bring the jury back.

(A brief recess was taken.)

MR. CASSELL: All rise.

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(Jury present)
THE COURT: Be seated. The jury is back. Mr. Motley, would you call your next. Or Mr. Cross.
MR. CROSS: Thank you, Your Honor. At this time plaintiffs would call Mattie Blevins, and while she's coming to the courtroom, Judge, we have one very brief housekeeping matter.
Most of these employees or former

employees of the Veteran's Administration have been brought here by subpoena, either by the plaintiffs or the defendants or both, in most cases, and we have agreed that those who have testified thus far do not need to be called back and would like to release them from the subpoena. And with the Court's permission, we would like to tell them that.
THE COURT: Counsel?
MR. WAGNER: We have no objection.
THE COURT: All right.
MR. CROSS: Thank you.
THE COURT: Would you raise your right hand.
THE WITNESS: Yes, sir.
PLAINTIFFS' WITNESS, MATTIE BLEVINS, SWORN
THE COURT: Have a seat right there, please. Would you tell this jury your name.
THE WITNESS: My name is Mattie Blevins.
THE COURT: Spell your last name.
THE WITNESS: B-L-E-V-I-N-S.
THE COURT: Thank you.

Mr. Cross.
MR. CROSS: Thank you, Your Honor.

DIRECT EXAMINATION
BY MR. CROSS:

Q Mrs. Blevins, just because there's been some confusion on the part of my office, could you spell your first name for the court reporter as well.
A Yes. It's M-A-T-T-I-E.
Q Where do you live, ma'am?
A I live in DELETED.
Q What is your address?
A DELETED.
Q Is that a county road?
A Yes, it is. DELETED.
Q Are you employed at this time, ma'am?
A No, I am not.
Q Are you retired from some employment?
A Yes. I'm retired from the VA.
Q And could you look at this jury when you're giving your answer?
A Yes, I would.
Q Because I already know what you're going to say. At least I hope I do.

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When did you retire from the VA?

A I retired from the VA in June of '94.
Q And how many years did you work at the VA?
A 27 years.
Q So would that be, if my math is right, that's something around 1967 or thereabouts?
A That's correct. 1967, July 1967.
Q Great. Now, could you tell us, did you work for the VA continuously through that time period?
A Yes, I worked for the VA during all that time. Most of the time I worked in building management.
Q Let's just go back to the beginning, if you would kind of briefly relate the different jobs and places you worked for the Veteran's Administration during your 27-year career there.
A Okay. When I hired in in July, I worked approximately, just give you approximate dates, about six months in the laundry. I went from the laundry into housekeeping. Both these services were under building management. That's what our service was called.

Then from there I went to medical

administration, and I worked approximately two years in medical administration. And then from there I went as a supervisor for about 23 years for housekeeping. My title was housekeeping aide foreman.
Q Housekeeping, I'm sorry?
A Housekeeping aide foreman.
Q Okay. And would that -- I take it you had people who worked under you then?
A Yes, sir. I had -- sometimes I had 15, times I had 30. It depended, if I was pulling relief for another supervisor or if I was just supervising my crew alone.
Q And what did the 15 to 30 people that worked under you do?
A Well, we did -- various tasks. We were responsible for keeping the hospital sanitary. We were responsible for sweeping, mopping, washing walls, washing ceilings, cleaning restrooms, anything else that you could imagine, just to keep the hospital able to pass accreditation.
Q And did you perform this function throughout the 23 years you were in the housekeeping department?

A Yes, sir.
Q Now, might I also ask that during that same 23-year period, did you have occasion to go to all areas of the hospital or were there areas you would not go to?
A Yes, sir, I went all over the hospital.

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That's the reason I said I supervised more than 15 sometimes, because when I worked weekends there was a supervisor who had to fill in for me. And then when he worked weekends, I had to fill in for him, so I was over all of the hospital every day.

Q And did you yourself personally ever get involved in the actual physical labor of the housekeeping?

A Yes, sir, I was a housekeeping aide, like I said, when I left the laundry. I went to housekeeping and worked approximately two years. And I did anything and everything that there was for a housekeeper to do.

Q How about after you became a supervisor?

A My main focus there was to attendance, disciplinary action, training, and I had to make sure that everyone knew the proper procedures that were expected of them.

Q And did you -- when you were a supervisor, did you have opportunities then to still continue to go out into the various buildings around the complex?

A Yes, sir. That was my job, was to make sure that each person was doing what they were supposed to be doing, what they were trained to do, making sure that the ward that they worked on was kept sanitary and clean. I did on-the-job inspections every day; just a walk-through inspection.

Q During this time which you were a housekeeping aide, and then subsequently housekeeping aide foreman, did you become familiar with Building 16?

A Yes. I had to pull relief on Building 16 as the housekeeping foreman, and I did go through that building five days out of the week. Whether it was Saturday through Wednesday or whether it was Monday through Friday, I was always through that building.

Q Now, during this -- during your years at the Veteran's Administration, up until the time that, let's say up and through the late '80s, would you have had occasion to observe

the presence of cigarette smoke in the buildings where the patients were hospitalized?

A Yes, sir. I saw --

Q I'm sorry. Go ahead.

A I saw cigarette smoke every day until finally it was banned from smoking in the hospital itself. No matter where you went in the hospital, it was smoke. And more in the day rooms. The day rooms were kind of like what we would call maybe a family room at home. That's where the patients were to be most of the day, to smoke, to watch TV. They came and got them there for these other activities they went to, the nursing people

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would come get them. And that was just their, the living room, family room. It was bad. I mean, it was bad in there.

Q How would the presence of cigarette smoke in the quantities you've described affect your job in the housekeeping department?

A Well, it made it more difficult to clean because when we had to clean, sometimes we used the Johnson's product to wash the walls, and it was a good product, but

sometimes it just wouldn't cut what was on the walls and what was on the ceilings, what was on the furniture. We had like Naugahyde furniture, and it wouldn't take it off sometimes. So we had to go to other means, sometimes, like I know that I have mixed a floor stripper with water in order to cut it off and then rinse it so that it was presentable so that it was clean again. It was just so much nicotine on there you just couldn't imagine. Just couldn't imagine.

Q Were you accustomed to using this floor stripper for the entire time that you described in the housekeeping department until cigarettes were banned eventually?

A For certain jobs, yes, sir. Like when the floor that we were using wouldn't cut, we would have to go get something else to take it off. And then wash it again and rinse it again.

Q Did this increase -- well, strike that.

Were these extra measures you took, were they successful in getting the nicotine off of the ceiling tiles, for example?

A Yes. It took it off the ceiling tile. Back

in those days, when I was a housekeeper and I did the work myself, the ceilings in the day rooms and most of the hallways were metal, like a 12-by-24 inch long metal acoustic ceiling that went up in there. And after we would wash it with the stripper, then we would rinse it off. And then like engineering, if they were going to come over and paint after that, then they would put a coating on it so that the other nicotine that was left behind wouldn't bleed through and then they would paint the surface itself, yes.

Q You personally observed these measures being taken?

A I've done these measures myself.

Q Thank you. And just so that we're clear on this record, Mrs. Blevins, these conditions that you described and these cleaning measures you've described, they took place in Building 16 in addition to other possible places in the hospital; correct?

A Yes, sir. That's correct.

Q And did you actually perform these services

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in Building 16 yourself?

A No. I didn't perform them in 16. I performed them in 138. But 16 was the building that I pulled relief on, and by that time I was a supervisor and I didn't have to do the work, other than maybe just show someone how to do something like that.

Q But you would have supervised employees who did that work in Building 16?

A Yes, sir. That's correct.

MR. CROSS: Your witness.

THE COURT: Mr. Ohlemeyer.

CROSS-EXAMINATION

BY MR. OHLEMEYER:

Q Mrs. Blevins, my name is Bill Ohlemeyer. How is it that Mr. Cross already knew what you were going to say?

A You have to ask Mr. Cross that.

Q All right. You used the phrase "those days," a few minutes ago. What do you mean by those days? When was those days?

A Well, back in those days was when I first hired in and when I was a housekeeping aide myself, when I did the actual on-hands job myself.

Q So the hands-on work you described was

something you did in those days which would have been when you hired on.

A Back approximately a year after I hired in, yes, sir.

Q So that would be '67 or '68?

A I hired in in '68.

Q Now, you became a supervisor then at some point.

A Yes, sir.

Q And your assignment as supervisor was in Building 138; right?

A My main assignment was 138, yes, sir.

Q What does pull relief mean?

A Well, if you've got to work five days a week, government workers don't work more than 40 hours a week, so that meant that I had to work from Wednesday through Sunday, Mark, another supervisor, he would work through Wednesday -- whenever I came back on Sunday; he would pull Monday through Friday. And then when we rotated, and I worked like six weeks of pulling relief, then I would have to pull relief for him. But a lot of times he borrowed help from me out of my pool of employees, and I was in his building

every day, Building 16. And then after we lost supervisors, we were cut back on staffing. Everyplace cuts back on staffing, but when we were cut back on staffing, I had the whole front side, including Building 16.

Q What do you mean by the whole front side?

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A Well, there was Building 138, which was four stories high and a basement; the next building down was 124, which was three stories high; the next building was 15, and it was two stories; the next building was 16 and it had three stories; and the next building was 17 and it had two stories. So when I say the whole front side, that whole line of buildings that was down through there. Just like down a street, a whole block, it was my responsibility for several years.

Q And so you're a supervisor in 138, that's your primary assignment?

A That's when I first started as supervisor, yes, sir.

Q Then you have to pull relief on the front side?

A That's correct.

Q And would that be on each floor in each of those buildings?

A Yes, sir, that's right.

Q How much of that hospital was there when you got there in '67?

A All of it except the new building.

Q What's the new building?

A I don't even know the number of it. I don't go back out there very often, but there is a new building.

Q Do you know how long those buildings that you've told us about had been there before you got there?

A Well, it was established in '76, 1876.

Q 1876?

A Uh-huh.

Q Do you know if some of those buildings were that old?

A Some of the buildings were real old but they were still all occupied.

Q You mentioned the word "accreditation."

A Accreditation, JCAH.

Q What's that?

A It's when the hospital has to meet standards to be able to receive monies to help the

hospital run.

Q Who determines whether the hospital meets those standards?

A Someone from Washington came in and made inspections periodically, like every two years.

Q Did you ever meet with those people?

A No, I did not.

Q Do you know -- I'm sorry, you said every two years?

A Uh-huh. You're accredited every two years, yes.

MR. OHLEMEYER: That's all I have Your Honor. Thank you.

THE COURT: Mr. Furr.

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MR. FURR: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. FURR:

Q Hi, Mrs. Blevins, my name is Jeff Furr. I have a few questions.

A Yes, sir.

Q You mentioned the painting of the ceilings in Building 16?

A Yes.

Q During the years that you were a supervisor,

how often were those ceilings painted?

A Not too often.

Q Every couple years?

A No. Probably not even that often.

Q Okay.

A But we washed them more often than that.

Q How often did you wash them?

A We tried to every year, to wash them. We tried to strip the walls and everything every year. And then if something was more used, more deteriorated, we tried to work on that more. As, you know, like your restrooms and things, you couldn't go a year without washing those down and cleaning them.

Q Were there also some ceilings that you didn't get to every year?

A Yes, sir, I'm sure there is.

Q Do you recall whether the ceilings in the day room on 16A were cleaned every year?

A No, sir. They weren't cleaned in the latter years. I'm talking about the last 20 years, they weren't cleaned every year, because they went to this kind of tile, acoustical board tile.

Q The ceiling in 16A was 12-foot tall, wasn't it?

A Yes. We had to use ladders to get into it.

MR. FURR: Thank you. That's all I have.

THE COURT: Redirect, Mr. Cross.

MR. CROSS: Very brief, Your Honor.

REDIRECT EXAMINATION

BY MR. CROSS:

Q Mrs. Blevins, can you tell this jury when you met me for the first time?

A When did I meet you for the first time? Today.

Q And can you tell this jury approximately, we did, in fact, meet briefly before we came over here for your examination today; did we not?

A Yes, sir.

Q Can you tell the jury how long you and I talked about what you would be testifying to here today?

A Two minutes maybe.

MR. CROSS: Thank you. No further questions.

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MR. OHLEMEYER: Nothing, Your
BLEVINS-REDIRECT
2625
Honor.
MR. FURR: Nothing, Your Honor.
THE COURT: Ma'am, the lawyers tell me you will not be recalled as a witness, so you are excused from your subpoena. You may step down.
THE WITNESS: Thank you very much.
THE COURT: Thank you. Call your next.
MR. CROSS: Plaintiffs would call Reverend Donald Kochanek.
THE COURT: Good afternoon. Would you raise your right hand.
PLAINTIFFS' WITNESS, DONALD KOCHANEK, SWORN
THE COURT: Have a seat right there, sir. You might pull that up just a little bit. Thank you. Well, whatever. Tell the jury your name.
THE WITNESS: Donald R. Kochanek.
THE COURT: Spell your last name.
THE WITNESS: K-O-C-H-A-N-E-K, Polish.
THE COURT: Go ahead, Counselor.
MR. CROSS: Thank you, sir.
DIRECT EXAMINATION
KOCHANEK-DIRECT
2626
BY MR. CROSS:
Q Mr. Kochanek, you have a title; do you not?
A Chaplain.
Q You refer to yourself as chaplain?
A Yes. I'm also an Army chaplain and VA chaplain.
Q What's the difference between a chaplain and a reverend?
A Same.
Q Okay. So if I call you reverend, will you not be offended?
A I'll answer you.
Q All right. Good deal.
Where do you live, sir?
A I live in DELETED.
Q What's your address?
A DELETED.
Q And is that in the county or is that in town or where is that?
A It's about a mile out of town, in the county of Grant County.
Q I'm going to ask you to look at this jury when you're giving your answers because I do know the answers to some of those questions, but I'd like for them to know the answers
KOCHANEK-DIRECT
2627
too.
Mr. Kochanek -- Reverend Kochanek, are you an Army veteran?
A Yes, I am an Army veteran of two wars, Korean War and Vietnam War.
Q When did you serve in the Army?

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A I served in the Army from '67 to '75 as active duty, and then I was in reserves and retired from the reserves. I was a lieutenant colonel.
Q And whereabouts did you serve?
A I served in Vietnam, Okinawa, Germany, and all over the United States.
Q Can you tell the jury a little bit about the kind of things you did while you served in our nation's military?
A As a chaplain, regular services like a pastor, counseling services. I usually work with basic trainees, so I was at Fort Ord, California, for three years where I had a lot the lectures to give them. They had four lectures to -- they had on, it was human basic training for eight years, preparing -- eight years -- eight weeks preparing for, to go over to Vietnam.

Q Okay. And might I ask you what denomination you are a chaplain in?
A I'm Baptist, General Baptist. General Associate Regular Baptist.
Q I'm not familiar with the different denominations.
A There are many different kinds of baptists, Southern Baptist, there's Independent Baptist, there's Decedent Spirit Baptist. You name them, there are just all kinds of Baptists, and General Baptist is what -- I was endorsed for the military by the General Baptists.
Q All right. Subsequent -- when did you -- are you still in the reserves?
A No. I retired from the reserves in June of '92.
Q Okay. So let me go back a step. Are you a family man?
A Yes, I have -- raised five children. I'm married, raised five children.
Q Have grandchildren?
A Yes. I have 12 grandchildren.
Q Do you have any regular employment at this particular time?

A I'm retired from the VA; however, I am on a fee basis. That means when one of the chaplains takes off on vacation or someone gets sick, I fill in for them.
Q I believe you stated you're retired from VA now?
A Yes, I retired from VA in January of 1992.
Q So that presupposes there was a period of time where you worked on a regular basis at the VA.
A That is correct.
Q When did you begin that employment?
A I started in 1980 and worked -- retired in 1992.
Q Do you know Mildred Wiley?

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A Yes, I did.
Q And did you know her during that period of 1980 to 1991, say, when she died? Did you know her during that entire time?
A I knew her for about -- during about seven years, from -- got to know her pretty well, about '87 to '92.
Q All right. Now, tell the jury, if you would, what kind of employment activities you had during that 12 years you were at the

VA Hospital.
A Okay. Ordinarily the chaplain's main duty was to be seen by the patients, and we would visit all of the different buildings where patients were located. We also held chapel services. We held services on the buildings themselves on different days. We also had lectures. And we also did counseling. And we also, since it was a national cemetery in Marion, we also had a lot of times we'd have burials, too, that we'd have. If the family did not have a minister, we would conduct the service; whatever they asked for, we would take care of it.
Q What parts of the hospital did your work take you to during this time?
A All different parts, actually, during my 12 years.
Q Were there particular buildings in the hospital that you might have worked in --
A Yes.
Q -- more than others?
A In about 1987, I think it was about 1987 to 1992 I asked if I could work primarily in the medical buildings, 138, and then also I

was given Building 15B, B meaning the second floor, 16A, B, and C, and 17B, and then I had the psych building, suicidal, assaultive patients, Building 4.
Q Why did you ask for those responsibilities?
A I asked for the medical building because I thought it would be better to have one chaplain all the time visiting that medical building where the patients were getting better in their care, someone they would get to know. And that's why I asked for the medical building.
Q How many years did you have occasion to frequent Building 16 on a regular basis?
A At least seven years, seven years or more, yes.
Q And was this the same seven years that you got to know Mrs. Wiley?
A Yes, that's correct.
Q Can you tell this jury what you observed about her and her person and her character.
A Yes, she was an excellent nurse. She took her job very seriously. She was a hard worker. She usually, even a lot of times,

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even though there was nurse's aides, nurses

there, she always did her share. She was out working all the time. A lot of times even she would say, I'll go check on patient so and so, and she did so.

Q Let me go back to a question I omitted from back in the days of your military service. And in particular, in the '60s and early '70s, did you have occasion to observe whether or not the servicemen who you would counsel as a chaplain would obtain free cigarettes from any source?

MR. OHLEMEYER: Objection, Your Honor, relevance.

MR. WAGNER: Objection.

MR. CROSS: Your Honor, it's the basis for the entire fact that all these veterans had a smoking habit.

THE COURT: Objection sustained.

MR. CROSS: Question withdrawn. We'll move on.

Q What was the -- did you have occasion to observe the presence of smoking, smoking, cigarette smoke in the wards where you chaplained at the VA Hospital?

A Yes, very much so.

Q And could you describe for this jury what the condition of the smoke was on Building 16?

MR. WAGNER: Isn't this cumulative at this point?

THE COURT: I'll allow him to answer that question, but we have heard several witnesses on this. But you can answer that question.

A Yes, there was smoking on 16A. Usually they had the patients, since these patients were total care, they were usually in geri, called geriatric chairs. They're larger than a regular wheelchair. They'd fold down. And usually these patients were total care, and even some of them had to hold the cigarette in their mouth for them to smoke, had to watch them pretty closely, that they didn't burn themselves. Some even had burn marks, you know, on their clothing.

Q You observed that yourself.

A Oh, yes.

Q Did you -- was there any physical -- did you observe any physical, any physical observations as to the -- on the walls or

the ceilings as to the presence of cigarette smoke?

A Especially the ceiling. They were usually brown. And they used to change the tile every so often.

Q You did see that.

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A Yes.
Q Okay. What kind of ventilation did you observe in Building 16 during the years you worked there?
A I don't really remember that, as far as the ventilation goes. I don't remember if they had any fan in the window or not. I think the windows were usually closed most of the time.
Q I'm sorry. Were you finished?
A Yes.
Q Okay. During this 12-year period that you worked in there, do you recall any measures that may have been taken that might have dissipated the smoke at all? If there were fans, for example, were they working?
A Well, I just went back to check. I see they had a fan in there now, in one of the windows. But they did bring smoking eaters

in later on.
Q Did those work?
A Not very well. You could hear them snapping and make noise and things, but they didn't really take all the smoke out.
Q Okay. Now, during the time -- are you familiar with the fact that Mrs. Wiley became a head nurse and was given an office of her own in that building?
A Yes.
Q Did you observe her as she conducted her duties as head nurse in those years?
A Yes, I did observe her, yes.
Q Did Mrs. Wiley stay in her office with the door closed or did she do other things?
A Ordinarily, if her door was closed, she was talking to an aide or a nurse or someone else.
Q Did that happen very often?
A No, it did not. Her door usually was always open.
Q Even when she was in there?
A Yes, that's correct.
Q And was there anyplace in that building that the smoke did not reach?

A It's a possibility that way down on the east side, way, way down the hall, you know, at the other end, maybe so. I don't know about that.
Q But for the most part, everywhere you observed in Building 16, the smoke was there.
MR. WAGNER: Leading and suggestive, Your Honor.
THE COURT: Leading. Sustained.
Q Other than way down on the east side, can you think of any other place where the smoke did not reach?
A No, I cannot.
Q And how thick was the smoke on the first

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floor of Building 16?
MR. OHLEMEYER: Objection, Your Honor, lack of foundation as to time.
Q At anytime during the years you worked there.
A It was smoke. I know that. Very much so. And I don't know. The area where they smoked was right across from the nurse's station, and it was a small area. It wasn't very large. I would say it was about 20 by

about 10 deep, something like that. And usually there may be about 12 guys in there, usually in geri chairs. Most of them are geri chairs.
Q Thank you. Are you a smoker, Reverend?
A No, I'm not. No, I'm not.
Q For my last question Reverend Kochanek, this question has been passed to me by my co-counsel. He wants me to ask you if a General Baptist is the same as a Southern Baptist.
A No, it is not.
MR. CROSS: Thank you.
MR. OHLEMEYER: No questions, Your Honor. Thank you, Reverend.
THE COURT: Mr. Wagner, any questions?
MR. WAGNER: No questions.
THE COURT: Thank you, sir. Call your next.
MR. CROSS: May Reverend Kochanek be released?
THE COURT: You don't intend to recall?
MR. OHLEMEYER: We haven't

subpoenaed him.
MR. WAGNER: We haven't subpoenaed him, Your Honor. Apparently the plaintiffs subpoenaed him, not us.
THE COURT: You are released from your subpoena.
THE WITNESS: Thank you.
THE COURT: Thank you.
MR. MOTLEY: Dr. David Burns, Your Honor.
THE COURT: All right. Would you raise your right hand.
PLAINTIFFS' WITNESS, MICHAEL BURNS, M.D., SWORN
THE COURT: Would you have a seat, please. Would you tell this jury your name.
THE WITNESS: My name is David Michael Burns.
THE COURT: Spell your last name for the record.
THE WITNESS: B-U-R-N-S.
DIRECT EXAMINATION
BY MR. MOTLEY:
Q Doctor, I hope you're feeling better today.
A Well, I'm about 90 percent, but I appreciate

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that. Thank you.

Q You've been with us for a while unfortunately, haven't you?
A Well, part of that was my own doing, I guess.
Q And where did you come here from?
A From San Diego, or, actually I came from Japan, but I live in [DELETED].
Q What were you doing in Japan?
A I was speaking at an international conference on mechanical ventilation.
Q On ventilation for buildings?
A No. No. It's breathing for people in intensive care units. Machines that breathe for people.
Q You were born May 6, 1947?
A Yes, sir, I was.
Q And you and I have accents. The jury already knows where mine comes from. What about yours?
A Well, most of mine comes from growing up in Boston, Brookline, Jamaica Plain, which are suburbs of the city of Boston.
Q You are married?
A I am.
Q You have children?

A I have one child, a 13-year-old boy.
Q You went to Boston College in Massachusetts and got a B.S. degree in biology in 1968; is that correct?
A That's right.
Q You went to Dartmouth Medical School in New Hampshire and received a BMS in medicine in 1970?
A That's right.
Q What is a BMS?
A That's a Bachelor of Medical Science.
Q And what is that?
A The first two years of medical school are basic science years. They are anatomy, physiology, molecular biology, chemistry, different topics that are largely taught in the classroom. So I took the first two years at Dartmouth. At the end of that period of time, they gave us what was referred to as a Bachelor of Medical Science.
Q And then you received your medical degree in 1972 from what medical school, sir?
A I graduated from Harvard Medical School with my doctorate in 1972.

Q And that, of course, is in Boston?
A Yes. It is.
Q And your current position is what?
A I'm Professor of Medicine at the University of California School of Medicine in the Division of Pulmonary and Critical Care

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Medicine.
Q And are you what's known as a full professor of medicine?
A That's correct.
Q And how long have you been in teaching in medical schools, Dr. Burns?
A I've been teaching in medical schools, well, largely since graduating from medical school, but I've been on the faculty as UCSD since 1979.
Q 19 what?
A '79.
Q You're the coordinator of the Developmental Pulmonary Clinical Research Lab?
A That's correct.
Q So that no one knows this is a mystery, I have your resume here, don't I?
A Yes, you do.
Q Okay.

MR. MOTLEY: In the interest of time, Your Honor, on these non-controversial questions, if I can just ask him about that, save us some time?
MR. OHLEMEYER: No objection.
Q What is the Developmental Pulmonary Research Clinical Laboratory?
A Well, a lot of the newer testing modalities for patients in the hospital have to be evaluated. We do evaluations of equipment that the manufacturers bring in for us to assess whether they actually do what they say they do. And we also work with manufacturers to help them develop new and better equipment to help take care of patients in intensive care units and other environments.
Q Doctor, you are a critical care and lung specialist; is that correct?
A That's correct.
Q Does that include cancer in what you do?
A It most certainly does.
Q And you are also the medical director of respiratory therapy.
A That's right.

Q Explain that, please, what is respiratory therapy?
A Respiratory therapy is the care of the respiratory system in a hospital. By and large the bulk of that care, it revolves around delivery of artificial ventilation with machines. The rest of the care is related to delivery medicines that open up the airways, help people breathe and help people clear secretions and also deliver oxygen to people.
I'm responsible for the overseeing of the care that is provided throughout the institution for those modalities of care.
MR. MOTLEY: Your Honor, may I give

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the witness this?
THE COURT: Go ahead.
THE WITNESS: Thank you.
Q Is the University of California at San Diego part of the University of California educational system, sir?
A Yes, it is. It's one of the five medical schools in the University of California system.
Q And what courses do you teach at the medical

school?
A I teach critical care medicine, I teach respiratory physiology, physiology. I also teach the diagnosis and management of pulmonary illnesses, and I instruct the second year class in cessation from cigarette smoking.
Q Doctor, you're the second medical doctor who's testified, I believe. And so the other one was a pathologist, Dr. Roggli. If memory serves me correctly, Dr. Roggli looked -- told us he looked threw microscopes and things like that. Are you a doctor who actually takes care of patients and listens to their chest and takes histories from them?
A Yes, I am.
Q And how long have you been doing that?
A Well, I've been doing that again since before I graduated from medical school. The last two years of medical school are spent in clinical care of patients. And I've been taking care of patients at the University of California since I became a fellow there, which was 1976, and it's been part of my

responsibilities as a member of the faculty since 1979.
Q Doctor, again looking at this, one of the witnesses called it a cheat sheet or, I did for them. This is your resume here. You have been a medical officer of the National Clearinghouse for Smoking and Health, the Bureau of Health Education, the Center for Disease Control in Atlanta, Georgia, for two or three years?
A That's right. After completing my residency on the Harvard Medical Service at Boston City Hospital, I joined the Public Health Service and was medical officer for the National Clearinghouse for Smoking and Health.
Q And the Center for Disease Control, I think most of the folks on the jury know what that is, but for the record, so we'll have a complete record, would you state what the CDC is?
A The Center for Disease Conrol is now the Center for Disease Control and Prevention, and it is the agency of the Public Health

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Service which is responsible for monitoring,

evaluating, and preventing disease.

Q As a medical officer for the National Clearinghouse for Smoking and Health from 1974 to '76, what did you do?

A There was a number of responsibilities. The principal one was to author the 1975 Report of the Surgeon General on Smoking and Health.

Q You were actually the author of the Surgeon General's Report on Smoking and Health.

A That's correct.

Q And that was?

A 1975. At that time, the report was prepared internally. It was prepared by the medical officers at the National Clearinghouse for Smoking and Health and then was sent out for extensive external review.

Q What was that report of 1975 by the Surgeon General on Smoking and Health called, do you recall?

A There was no special name for it at that time. That was a report that reviewed all the information in the past year in published medical literature on smoking and health, and it had a special individual

chapter on involuntary smoking or exposure to environmental tobacco smoke.

Q Now, Doctor, you have been the author or an editor or contributor to more than one Surgeon General's report?

A That's correct. I've been an author, editor or senior reviewer for every Surgeon General's Report since 1975.

Q And how many reports are those?

A Oh, let me think. '75, '76, '79, '80, '81, '2, '3, '4, '5, '6, '89, '90, '92 and '94, as well as actually one other one that is not traditionally included in that group, which was on smokeless tobacco.

Q Smokeless tobacco?

A That's correct.

Q That's like?

A Chew.

Q Chew.

A That's right.

Q Doctor, after you finished being the principal author of the 1975 Surgeon General's Report, did you then take further education?

A Yes. I spent three years as a pulmonary

fellow at the University of California San Diego in the pulmonary division, their lung disease division.

Q And are you board certified? First explain what board certification means for a doctor that treats patients.

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A Board certification is a process of certifying that someone has reached a certain level of experience and training, as well as a certain level of knowledge, which requires a completion of a set, prescribed set of experiences over a period of time. And then you're allowed to sit for an examination. If you pass the examination, then you are then board certified. I am board certified in internal medicine, in pulmonary medicine, and have a certificate of special accomplishment in critical care medicine.

Q Doctor, have you been a consultant to the Office on Smoking and Health from 1979 until presently?

A Yes, I have.

Q What is the American College of Chest Physicians?

A American College of Chest Physicians is a group of physicians who care for diseases within the chest. That includes pulmonary physicians, cardiologists and chest surgeons. And they have a journal, they also have a set of meetings, and an educational program that they conduct.

Q Have you been on the research advisory board for the Institute for the Study of Smoking Behavior and Policy at the John F. Kennedy School of Government at Harvard University?

A Yes, I have.

Q What is that, sir?

A That was an institute set up at the Kennedy school to examine the public policy issues surrounding tobacco use, particularly surrounding the issues of trying to examine how governmental actions, taxation, various other actions influence the way people start to smoke and whether or not they try to quit.

Q Sir, have you been a policy advisory committee member for the Community Intervention Trial For Smoking Cessation of the National Cancer Institute?

A Yes.

Q And what is the National Cancer Institute?

A The National Cancer Institute is one of the institutes of the National Institute for Health. They are the principal agency that is tasked with investigating research level to the causes and treatment of cancer. Community Trial was a trial in 11 different communities of a community-based, that is an effort that was based on the entire community, to see whether they could change smoking behavior. They used a variety of different modalities, media, quit information assistance at the physician level and a variety of other interventions

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to try and help people build support within the community and also to help people as individuals to quit.
Q Have you been a consultant to the Environmental Protection Agency or commonly known as EPA?
A Yes.
Q Their indoor air quality advisory committee?
A That's correct.
Q That was from 1990 to 1991?

A That's correct. I was on the science advisory board for -- it's actually went through 1992, I believe, but I was on the science advisory board for the, what is referred to as the EPA Report, looked at environmental tobacco smoke.
Q And I believe that that's Exhibit No. 50154.
MR. MOTLEY: Mr. Cassell, might I look at that? It's one of those two books -- should be one of those two right there.
THE WITNESS: Second one.
MR. MOTLEY: Second one. This one. May I approach, Your Honor?
THE COURT: Go ahead.
Q It's 50234. Would you hold that up and explain what that is, please, Doctor.
A This is the report by the Environmental Protection Agency on "The Respiratory Health Effects of Passive Smoking, Lung Cancer and Other Disorders." This is volume, actually, is a printing of that that was reprinted by the National Institute for Health because there weren't enough copies to meet the demand printed by the EPA.

Q Is this a copy of the original?
A That's a copy of the original. They are essentially the same document.
Q And your role in this document, which has been admitted into evidence, was what again, sir?
A I was on the science advisory board. The document itself was prepared by EPA, went through an extensive review internally, went through a science advisory board review, which was a public review. That is, people who were interested in the topic came and presented to the science advisory board, went back, was revised again, and again went through the same process a second time.
My responsibility was to be on that science advisory board which included about 15 people, I think. And we were asked to evaluate whether the information was correct and accurate and provide them advice about how the report should be structured and modified.
Q Sir, were you -- what is the U.S. Consumer Safety Product Commission?

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A The U.S. Consumer Product Safety Commission is that agency of the federal government that is tasked with making sure that the products that we all buy are safe.
Q And were you a member of the U.S. Consumer Product Safety Commission on fire-safe cigarettes?
A That's correct. They had a special commission that was looking into trying to design, or whether it was possible to design characteristics of a cigarette that would make it fire-safe. That is, that would allow a cigarette to fall on a couch, for instance, and not set the couch on fire.
Q What is the American Cancer Society, sir?
A The American Cancer Society is a voluntary health agency that is interested in the diagnosis, management, and cure of cancer. It's a voluntary health agency. It collects donations, and uses those donations to provide service in the community as well as to conduct research.
Q Were you the president of the San Diego unit of the American Cancer Society?
A Yes, I was.
Q What is the American Lung Association?

A The American Lung Association is also a voluntary health agency, similar to the American Cancer Society. And its principal interests are lung disease, including lung cancer and chronic obstructive lung disease.
Q Were you a member of the board of directors of the Lung Association of San Diego?
A Yes, I was.
Q Have you served as an expert witness for the Attorney General of the state of Canada?
A Yes, I have. It's actually not a state but --
Q Excuse me. That's true. The nation of Canada.
A Yes. I have.
Q And what was that -- does that have any relationship with what we're talking about here?
A It did. The country of Canada had passed legislation.
Q Just tell us it had to do with cigarettes.
A It did, yes. I'm sorry.
Q That's okay. Now, I want to ask you about some awards that you may have received. Did you receive the United States Surgeon

General's medallion?
A Yes, I received the Surgeon General's medallion from Dr. Koop.
Q From Dr. Everett Koop, the gentleman with the beard.
A That's correct.

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Q Did you receive the American Lung Association Life and Breath, B-R-E-A-T-H, Award for distinguished community service?
A I did receive the Life and Breath Award.
Q Doctor, without going through all of these, I want to hand you a seven-page list of publications of yours and ask you to confirm that these are all scientific publications that you've authored.
A Yes. This appears to be an accurate copy of my CV.
Q In addition to the Surgeon General's Reports, have you authored scientific articles on cigarette smoking and health?
A Yes, I have.
Q And do you maintain an interest in that currently, sir?
A I certainly do.
Q In fact, sir, did you serve as a consultant

to the Koop/Kessler committee?
A I did.
Q Would you explain what the Koop/Kessler committee was and when it issued its report?
A I can't give you the exact date, but it issued its report earlier last year.
MR. OHLEMEYER: Excuse me, Your Honor, may we approach for a minute?
(Bench discussion)
(Discussion off the record)
Q Doctor, without going into the Koop/Kessler report --
A Right.
Q -- your involvement was on the science end, I take it?
A That's correct. I was a scientific consultant to that group.
Q And in the science aspect of that, did you look into issues such as addiction?
A Yes.
Q The additives in cigarettes?
A Yes.
Q Of the diseases caused by cigarettes?
A That report didn't specifically deal with diseases, but certainly that's the substrate

on which it was based.
Q I said Koop/Kessler, not -- for some reason, my chart here looks like the Leaning Tower of Pisa. And I don't know why I can't -- but you already told us who Koop was. Who is Kessler?
A Dr. Kessler is currently, I believe, the Dean of the Yale Medical School. He was the former head of the Food and Drug Administration.
Q Now, Dr. Burns, as part of your clinical practice, do you, over the years, have you treated people who had what you believed to be cigarette-related lung disease?
A Absolutely.

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Q Including lung cancer?
A Lung cancer and chronic obstructive lung disease are one of the principal sets of diseases we see as a pulmonary physician.
MR. MOTLEY: Your Honor, could you inquire if the jury can hear him?
THE COURT: Can you hear the doctor all right?
You might move just a little closer to the mike. Thank you.

MR. MOTLEY: Judge, could I move over this way a little bit?
THE COURT: Surely. Not if you'll talk loud enough for me to hear, I believe the jury can hear.
Q Dr. Burns, in the course of treating patients, do you treat patients for a dependency upon nicotine?
A Yes, I do.
Q What does it mean? What is dependency upon nicotine called? What's the common term for it?
A The common term is addiction.
Q Would you explain what it is in your personal experience you do to try to help people who have a dependency or addiction to nicotine.
MR. OHLEMEYER: Objection, Your Honor. Relevance.
MR. MOTLEY: Your Honor, you've already permitted testimony about this. Goes to the dangerousness of cigarettes.
THE COURT: Objection overruled. You may answer, Doctor.
A Principally the characteristics of an

addiction is that you lose control over, or volitional control over the next use of an agent. You no longer make a free choice about whether you continue to use it and that becomes a compelling and compulsive use of that agent even when it causes you injury.
What we do is we try to provide people with a variety of different approaches to quit it. One of them is to support them behaviorally, give them some behavioral counseling, teach them some behavioral approaches.
We also use a variety of methods by which we replace the nicotine that they've been getting from cigarettes. Initially we used chewing gum containing nicotine. More recently we have been using patches which transfer the nicotine through the skin, and nasal inhalers which allow the nicotine to be absorbed directly through the mucus membranes of the nose.
Q Have you written or participated in publications about the dependency or

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addiction of nicotine?

A Certainly. Among others I was the senior reviewer for the 1988 Surgeon General's Report on Nicotine Addiction.

MR. MOTLEY: May I approach the witness, Your Honor?

THE COURT: Go ahead.

Q Would you hold this, tell the jury what this is.

A Yes. This is the Surgeon General's Report, from the year 1988, and this entire report was devoted to the discussion of the topic of nicotine addiction. It is -- the report concluded that cigarette smoking is an addictive behavior and that nicotine is the agent that is the addictive agent in cigarettes.

Q And what was your role in that?

A I was the senior reviewer for that document.

Q Just briefly, what does that mean?

A That means the Surgeon General's Report has a two-stage review. There are authors, and its edited internally, and then it goes through a review at each chapter level. All the chapters are then combined into a single volume, sent out to senior reviewers who

look at the balance, tone, and content of the document and provide a written response to the Office on Smoking and Health.

Q Can you see what I write up here? I'll tell you what it is. See if you can't see it. If we were to see the term "narcotizing," have reference to the term "narcotizing," as a scientist, what does that mean, sir?

A In general it means something that produces a narcotic-like effect.

Q What is a narcotic-like effect?

A Which is a sedative, mildly euphoric-type effect.

Q Euphoric?

A Can also be euphoric, yes.

Q What does euphoric mean?

A Means it produces a sense of distancing from reality and pausative sense of well-being.

Q I probably qualify for a doctor since I can't write very well. Anybody's ever read a doctor's prescription.

A It was one of the prerequisites of being a physician, I'm afraid.

Q What does tranquilizing mean?

A Tranquilizing means it reduces your level of

energy and awareness. It sedates you, makes you quiet and less anxious.

Q Does nicotine in cigarettes, in the smoking of cigarettes, have a narcotizing and tranquilizing effect on those who smoke?

A Yes, it does.

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Q It does. Now, Doctor, I want to ask you, I'm going to be going into some scientific areas with you with the Court's permission, and you understand that in a court of law you can't guess or speculate?
A I do.
Q You're supposed to base your answers on reasonable -- reasonable scientific certainty, more likely true than untrue?
A That's true.
Q Okay. Before I go into those scientific issues, let me ask you, having been affiliated with the Surgeon General's Office since, I guess since 1973, through the --
A '75.
Q '75?
A Right.
Q Have you come to learn a bit about the history of the United States Surgeon

General's Office?
A Yes, I have.
Q And when was the U.S. Surgeon General's Office first formed?
A I can't give you the exact date, but it was well over a hundred years ago now, and it was part of an effort to deal with some of the epidemics that were occurring in the country at the time.
Q And has the surgeon general's office been in existence for over a hundred years now?
A Yes, it has.
Q The jury will hear the name Jessie Steinfeld, S-T-E-I-N-F-E-L-D. Can you tell the jury if you know Dr. Steinfeld?
A Yes, I do. I know Steinfeld well. He was the surgeon general in 1968 or '9 through about 1971.
Q And how did you -- don't tell us anything about him, but how do you, personally have you met his acquaintance?
A I met him through my work at the Office on Smoking and Health when I was in the Public Health Service and have maintained a relationship since that time based on the

work I have, I've done on tobacco control and tobacco and health as well as he has been a senior reviewer for the Surgeon General's Reports during the time that I was involved with them.
Q Can you continue to try to speak up a little bit, Doctor?
A I will.
Q I know you've not been exactly with it completely here the last two days.
What about a Dr. Julius Richmond?
MR. MOTLEY: Spelled just like the town, ma'am.
A Dr. Richmond was also surgeon general. He was surgeon general during 1968, I believe

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through --
Q Julius Richmond now.
A Oh, I'm sorry.
Q 1978?
A '78 through about '82. He was the surgeon general that we -- I worked with on several of the reports.
Q While we're mentioning that, would you just tell -- we may get into some of these later. Would you just one-by-one tell the ladies

and gentlemen of the jury what those documents are and what, if anything, you had to do with them.
A This is the 1981 Surgeon General's Report that looked at the changing cigarette, low-tar nicotine filtered cigarettes and the disease consequences. I was the -- one of the senior editors for that.
This is the 1983 Surgeon General's Report on Cardiovascular Disease. I was also a senior editor for that.
This is the 1980 report which was on Health Consequences of Smoking for Women. I was also the senior editor for that.
This is the 1986 Surgeon General's Report on Involuntary Smoking. I was the senior scientific editor, the editor responsible for the overall content of that volume.
This is the 1985 Surgeon General's Report on Cancer and Chronic Lung Disease in the Workplace. I was also the senior scientific editor for that volume, responsible for its overall content.
And this is the 1989 Surgeon General's

Report, Reducing the Health Consequences of Smoking, 25 Years of Progress. And I was a senior reviewer for this one.
Q We mentioned the Koop/Kessler matter.
A Yes.
Q Would you identify it right now for the record. Don't tell us what it's about, just identify it.
A Yes. This is the final report of the Advisory Committee on Tobacco Policy and Public Health commonly referred to as the Koop/Kessler Report.
Q That was issued when?
A July 1997.
Q You were a consultant to that?
A I was.
Q Now, Dr. Burns, briefly, in your opinion, as a lung specialist and a cancer specialist, what different diseases do direct smoking, that is people who smoke cigarettes, a pack or more a day for 25 or more years, what diseases do cigarettes cause, in your opinion?
A They cause cancer of the oral cavity, of the

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larynx.

Q What do you mean by the oral cavity?
A The mouth, the tongue, pharynx, the back of the throat, the larynx, the voicebox, the esophagus, the tube that you breathe in, the lung, the pancreas, kidney, and urinary bladder. They also cause conic obstructive lung disease, which is a narrowing of the airways which makes it difficult to breathe. Cause heart disease and stroke. They cause rupture or dilation of the major vessel of the blood system called the aorta. That's called an aortic aneurysm. And they cause blockage of the vessels that go to your extremities in your legs, that's referred to as peripheral vascular disease.
Q Peripheral?
A Peripheral vascular disease. There are also some special consequences for women. Women who use oral contraceptives have an increased risk of cerebral hemorrhage, also increased risk of myocardial infarction in those women.
Q What is myocardial infarction?
A The obstruction of the blood vessels that supply the heart, commonly called a heart

attack.
There is also consequences for the fetus, the fetus is small, has a higher mortality, both in utero and post-utero, and there are complications of pregnancy for the mother specifically related to the placenta.
Q That list, let me ask you now, with respect to secondhand smoke or environmental tobacco smoke, what's the official name of it now? It's called passive smoking? What's it called now?
A Well, the exposure is to environmental tobacco smoke. And we refer to it either as passive smoking or involuntary smoking. The term that we use in the reports is involuntary smoking.
Q If the jury were to hear the word secondhand smoke, just a common parlance word, is there any difference between that and involuntary smoking?
A No, there isn't.
Q Doctor, to a reasonable degree of scientific certainty, does exposure on the job, occupational exposure, long-term occupational exposure to secondhand smoke or

environmental tobacco smoke cause lung cancer in human beings?
A Absolutely.
Q And how do you know that?
A Well, there's a variety of ways that you reach that causal judgment. Principally,

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what you do is you assemble all of the information that's available, scientific now, I'm talking about, and organize that information to see whether you can draw a causal conclusion.

The first piece of that evidence is to look at what happens with high-dose exposure. Obviously, secondhand smoke exposure is a lower-dose exposure than active smoking, and so the first thing that you would do, just as you would with examining asbestos or anything else, would be to examine what happens at high-dose exposure, and specifically what you're looking for there is whether there's a threshold for effect. And if -- could I go to the --

Q Yes, if you don't mind.

THE COURT: Go ahead, Doctor.

Q Keep in mind everyone has a seat, this lady has to take down what you say, so if you could kind of draw sideways.

A I will try and do that.

One of the common things that we examine when we're looking at a causal relationship is whether or not there is a relationship between the amount of the exposure and the consequences. In this case, we're looking at the risk of developing lung cancer in relation to the amount of exposure measured by the number of cigarettes someone smokes per day.

We have on this side a risk --

Q Excuse me, Doctor. Let me do this because your voice.

MR. MOTLEY: Your Honor, may I move this closer?

MR. OHLEMEYER: I also suggest if we proceeded by question and answer, it might be --

THE COURT: He asked permission, in addition, to show this to the jury. That's all right. I'll allow the narrative at this point.

A If you take the most common number of cigarettes that people smoke, one pack a day, and put it here --

MR. MOTLEY: Judge, could I give him this?

A That's 20 cigarettes.

Q Excuse me, Doctor, I don't want you to feel like Phil Donahue or anything, but if I give you this, I think it will amplify, okay?

A Does that help?

Then we can measure how much risk there is. The way that we measure that is by looking at the frequency with which people die of lung cancer who smoked 20 cigarettes per day, compared to people who never

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smoked. So we're looking at a relative risk or the ratio, the number of times that the risk is compared to a nonsmoker. While some studies vary, in general, we get a risk of about 10.

If we look at people who smoke between 10 and 19 cigarettes, we get a risk, it's down here about 7 or 8. If we look at people who smoke less than 10 cigarettes, we get a risk down here about 4.

If you look at people who smoke two packs a day, the risk is up here, 40 cigarettes per day, the risk is about 18 to 20. So what you can see -- and then the risk in the people who never smoked is defined as 1. So we have 1 here.

What we're looking for is whether there's some level necessary to produce the effect. We're looking for whether or not we have a relationship that looks like this, where it comes down and does that. So that it looks like this, some level which you don't see any lung cancer risk.

When you look at the actual data, and this is data from multiple studies, millions of people followed over many, many years, you see that the line that comes down is not too far off a straight line, and if anything comes in on the positive side, suggesting that there's absolutely no threshold whatsoever.

Q What does that mean, no threshold?

A There's no safe level of cigarette smoke. And that led us in the Public Health Service to communicate to people that there's no

safe level of smoking and there's no safe cigarette. The dose response relationship says that any level of active smoking creates an increased risk of lung cancer.

Well, the next step in the process is then to see whether the smoke that people inhale to define these risks is similar to the smoke that you inhale from the environment. It makes kind of logical sense that both of them are tobacco being burned and they should contain the same substances.

When you actually look at them, you find that the same compounds are present in both. There's a little bit of a different mix, and that difference in mix is largely produced by a difference in the temperature at which the tobacco is burned.

Q If someone were to light a cigarette and sit it here on this table for about 15 seconds, what would the tip be, temperature of the tip?

A Oh, it varies some with a cigarette, but it's about 500 degrees. And then it goes up to about, anywhere from 6 to 900 degrees,

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depending where you are when you inhale.

Most of you are familiar with the fact that when you see someone smoke and you draw through the cigarette, you get a glowing ember. What that glowing ember represents is an increase in the temperature at which the tobacco is being burned.

Q What's the highest temperature it gets?

A I think it gets 900 to 1000 degrees.

MR. OHLEMEYER: I object to lack of foundation.

THE COURT: Overruled on that count. You can answer, Doctor.

A And the difference then is that --

Q Did you answer the question? I don't know if the jury heard you.

THE COURT: The question was what is the highest temperature.

A 900 to about a thousand degrees, mainstream smoke.

The smoke then is defined scientifically under two parts. One is --

Q Can you draw that, by any chance?

A One is mainstream.

Q On the next sheet.

A I'm not sure what you're asking me to do.

Q Can you just show the vapor, mainstream/sidestream? Just kind of draw a cigarette.

A You have a cigarette, it's lit. You have smoke that curls up from the tip of the cigarette, and then you have the smoke that the smoker inhales, which comes, is drawn through the cigarette.

When you scientifically examine those two, you can actually measure the chemical compounds present in this smoke, compare them to the chemical compounds present here.

Q Do they have names, the vapors?

A There's a wide variety.

Q I'm just talking about the smoke you've drawn there, is that mainstream? Is that what --

A This is mainstream smoke here. And this smoke, the smoke that curls up from the tip, is called sidestream smoke. What we find when we compare those two is that both kinds of smoke have essentially the same chemicals in them. But the distribution, the relative concentrations are different. When you burn the smoke at a higher temperature, you get

more complete combustion of the smoke. When you burn it at a lower temperature, you actually produce more of some of the toxic and carcinogenic substances that are present in cigarette smoking. But for all intents and purposes, when you look at this

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scientifically, most of the toxic and carcinogenic substances that are present in mainstream smoke are also found in sidestream smoke.

So we now have a second piece to this causal trail. We know that mainstream smoke causes lung cancer; we know that there's no safe level of that exposure; and we know that sidestream smoke contains the same components.

So the next step is to find out how much exposure do you get.

Q Does who get?

A The people who are nonsmokers in an environment where tobacco is being smoked.

What was done was to go and measure a variety of these compounds in many different circumstances. Offices, bars, restaurants, homes, all kinds of -- automobiles. All

kinds of different places.

And when you look at how much is present in the air, and you go back and put it on that dose-response relationship, there is enough of a dose that you would expect a small increased risk.

The next step is to see whether people in that environment actually absorb that smoke.

Q What do you mean by that?

A Well, the smoke in the air obviously doesn't hurt you. In order for it to hurt you, you have to inhale it, have it be deposited in your airways, absorbed into your body. So the next step in the causal trail is to demonstrate how much of that happens.

Nicotine is essentially only contained in tobacco. And so it becomes a very good measure of the amount of exposure to tobacco smoke that an individual has either as a mainstream smoker or as an involuntary and passive smoker may be exposed through sidestream smoke.

When you look at nicotine, the easiest way to do that is to look at one of its

metabolites, because that stays around for a longer period of time.

Q That's a word that the jury, I don't believe, heard today, at least in the trial. What does metabolites mean?

A Nicotine, when it's taken into the body, is changed by some of the enzymes in the body, some of the processes by which we digest small compounds in the body. And it's changed into other compounds that are easier to excrete or have less direct effect than nicotine. So one of those is cotinine.

Q Would you spell that for us?

A C-O-T-I-N-E.

Q Sure.

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A I don't think that's right.
Q Where did you say you went to medical school?
A Well, one of the comments in my medical school review was that I can't spell.
Q C-O-T-I-N-I-N-E.
A The cotinine can be measured in saliva, in urine, or in blood, if it's readily available, and you can easily measure it in large numbers of people.

When you measure the amount of cotinine in people who are in environments where there's secondhand smoke, and compare that to the cotinine that's present in smokers, again, you find enough cotinine present that you would expect a risk. That step in the causal chain has been sufficient for us to define risks for low-dose exposure to asbestos and a variety of other agents and to regulate them.

However, with secondhand smoke, you can take it an additional step further. We actually have human studies, human epidemiology. Epidemiology is the study of populations of people and the disease occurrence in those populations. And we looked at the effect of secondhand smoke exposure. To look at that, we need to be able to see a difference in the amount of exposure. All of us have had some exposure to secondhand smoke. And in order to do an epidemiologic study, a study of two populations to look at differences in risk, those two populations have to have different amounts of smoke that they've been exposed

to. And that's a fairly complicated thing to do with an exposure like environmental tobacco smoke.

The simplest way to do that was to look at spouses whose husbands smoked, nonsmoking wives of smoking husbands, compared to nonsmoking wives of husbands who didn't smoke. There both sets of wives would be expected to have the environmental tobacco smoke exposure that occurs in the general population.

Q Just walking around?
A Just walking around, going to restaurants, working in offices, all of the other ways that we get exposed to smoke, but it would be expected because their husbands smoke that they'd have more than wives of nonsmoking husbands. And actually when you look at the cotinine in the urine of those individuals, you do find that they do have more, when those studies are done, and there's now been almost 40 of them.
Q 40?
A 40. You see an increased risk, small,

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consistent with dose, an increased risk of lung cancer. So you have unequivocal evidence that high-dose exposure is a cause of lung cancer; we know that the agent contains the same toxins and carcinogenic substances; we know that the amount present in the air is enough to expect a risk; we know that the amount that people absorb from that air is enough to expect a risk. And when you look at people with different levels of exposure, you actually find this. So there simply isn't any longer any scientific fact that this exposure can't cause lung cancer.

Q Thank you, Doctor. Could you return. I'll take your microphone for you.

MR. MOTLEY: Judge, were you intending to take an afternoon break?

THE COURT: I think we may do that now, Doctor. You can step down. We'll take a ten-minute break, ladies and gentlemen.

(Standard admonition)

MR. CASSELL: All rise.

(A brief recess was taken.)

MR. CASSELL: All rise.

(Jury not present)

THE COURT: Be seated. Thank you. Jury is not present. Matter to come to the Court's attention?

MR. OHLEMEYER: Your Honor, my partner, David Hardy, is here in town. He's in the courtroom watching the trial. And this afternoon, Mr. Motley -- I should say. Mr. Young served a subpoena.

MR. CROSS: I can't hear a word he's saying.

THE WITNESS: Your Honor, should I be here for this?

THE COURT: You're okay.

MR. OHLEMEYER: I think, Your Honor, you ought to quash this, sanction these guys. I think we ought to stop this game where every lawyer that comes in the courtroom gets a subpoena. This is ridiculous, Your Honor.

THE COURT: I saw that was filed with the court reporter. Did you file it?

MR. RILEY: I did not file it, Your Honor.

THE COURT: Who served the subpoena?

MR. JOSEPH YOUNG: I did, Your Honor.

THE COURT: Counselor, come up. What's the purpose of the subpoena on Mr. Ohlemeyer's partner here?

MR. JOSEPH YOUNG: The purpose, I

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believe, Your Honor, is to authenticate documents that were discussed earlier in the day that have some foundational information for Mr. Hardy to authenticate documents. That's my understanding.

THE COURT: Your understanding?

MR. JOSEPH YOUNG: I was just asked to serve the subpoena, Your Honor. I wasn't in the courtroom at the time the discussions concerning the documents took place.

MR. RILEY: There's probably no better individual, Your Honor, in this courtroom than Mr. Hardy to be able to authenticate these documents and thereby vitiating the problems that we've been having with regard to what Mr. Motley was arguing about.

MR. OHLEMEYER: The problem these lawyers have, Your Honor, is they spent four

years conducting discovery, they could have subpoenaed the Tobacco Institute, they could have taken depositions, they could have done -- you can't subpoena lawyers in the middle of a trial to authenticate documents. I really think the Court ought to --

THE COURT: Is there a motion?

MR. OHLEMEYER: I move to quash the subpoena. I move -- I would ask the Court, as a sanction, to admonish or to suggest to opposing counsel that they not continue this practice and bring these matters to the Court's attention before they start serving subpoenas.

THE COURT: Mr. Cross, care to be heard on the motion to quash?

MR. CROSS: I have nothing further.

THE COURT: Motion to quash is sustained, and I would make that suggestion to counsel.

MR. OHLEMEYER: Thank you.

THE COURT: I might tell you, another matter. As we know, we are dealing with a jury that has matters to attend to themselves and we've been accommodating in

that matter, but there's been a request -- I know we talked about this last evening, Mr. Ohlemeyer, as to how long we were going to go tomorrow afternoon. Jury has indicated to the bailiff, apparently, that 4:00 would be their hope. So I just tell you that in light of witness planning and that type of thing. So we'll go to approximately 4:00 tomorrow, especially since it's a Friday, I realize they have matters to attend to in their lives.

While we're all here and the jury is not here, apparently last, several days ago, Thursday or Friday, it was brought to my attention that there was an effort to take a

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photograph in the courtroom. Is that correct? Anybody know anything about that, from the plaintiffs' side?

MR. CROSS: No.

MR. JOSEPH YOUNG: Your Honor, the request was made to the bailiff, and the bailiff indicated that that was inappropriate and no photograph was taken.

THE COURT: All right. As we all know what the rule says, during sessions of

court, or recesses between sessions, and I would consider the evening to be a recess between sessions, there will be no photograph taken in this courtroom. And this is the courtroom.

Any other matter we need to attend to outside the presence, Mr. Ohlemeyer?

MR. OHLEMEYER: Not here, Your Honor.

THE COURT: Mr. Motley?

MR. MOTLEY: No.

THE COURT: Mr. Cross?

MR. CROSS: No.

THE COURT: Bring in the jury.

(Jury present)

MR. CASSELL: All rise.

THE COURT: Be seated. Jury back in its entirety together with the alternates. Would you again state your name, sir.

THE WITNESS: David Michael Burns.

THE COURT: And you recognize you're still under oath; sir.

THE WITNESS: I do.

THE COURT: Continue, Mr. Motley.

DIRECT EXAMINATION (cont.)

BY MR. MOTLEY:

Q Doctor, again, try to talk as loud as you can. I just want to make sure you were clear when you were down here. One of my colleagues said he didn't hear, I want to make sure the lady heard you, the ladies and gentlemen and the Court.

Did you say with respect to ETS -- and can I shorten lung cancer with LCA?

A Yes.

Q There were, you studied 40 people or 40 populations?

A No, there were 40 populations.

Q Okay. So more than 40 people.

A There were 40 individual publications, scientific publications that examined individual populations.

Q And when they do studies like that, epidemiological studies like that, they study just a handful of people or lots of people or you describe it.

A Well, it varies. Most of the studies examined patients who had lung cancer who

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were nonsmokers, and they selected a control

group from the hospital or the community, and looked at the frequency with which they were exposed to environmental tobacco smoke. Many of those studies varied from several hundred people to several thousand people.

There were also studies that examined populations looking forward in time, particularly one in Japan, that was a large population study of several hundred thousand people who were followed for multiple years, and there they looked at the frequency with which lung cancer occurred in wives of nonsmoking husbands as opposed to wives of smoking husbands.

Q Did I hear you say several hundred thousand?

A Yes, that's correct.

Q Okay. Now, Doctor, have you ever been asked by any government agencies to offer your expertise on whether or not ETS, or secondhand smoke, causes disease in human beings?

A Yes, I've been asked by a variety of agencies, including the local governments in San Diego, the county and city governments, as well as the state of California's

Environmental Protection Agency.

Q All right. Now, you indicated that you were involved with the U.S. Environmental Protection Agency report of January 1993 on secondhand smoke. Do you recall that?

A That's correct. This document right here.

Q Dr. Burns, what is a class A carcinogen?

A Carcinogens are classed into various groups based on the strength of the evidence. And group A carcinogen is called proven, that is, it's a proven carcinogen, and it's a proven carcinogen in humans, so it's referred to as a proven human carcinogen.

Q Was the conclusion of the Environmental Protection Agency in 1993 what I've written on the board or did they reach some other conclusion?

A No. The conclusion of the report and the unanimous conclusion of the science advisory board was that the environmental tobacco smoke was a proven human carcinogen.

Q Did I write that right?

A With the exception that it's group A, not class A. But yes, you wrote it right.

Q Picky, picky. Group A.

A Group A.

Q All right. Now, 1993 has been five years ago.

A That's right.

Q Since the EPA wrote the report of 1993, has the evidence about environmental tobacco

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smoke causing cancer in humans gotten more strong or less strong or stayed the same?
A The data has increased, and the number of groups who have reviewed it has increased. The conclusion has remained the same. The data that supports it is now even stronger.
Q In that regard, Doctor, let me move this out of the way a moment. Ask you, do you see your screen right there?
A I do. This terminal?
Q Correct. I'm going to show you these different organizations, and I think the jury will be able to see them, then you tell me whether or not these organizations have studied environmental tobacco smoke and whether they've concluded whether it causes or doesn't cause lung cancer, okay?
A Yes.
Q Show the first one, please.

A Yes.
Q 1986 Surgeon General's Report.
A That was the report that I was the senior scientific editor for, and yes, we concluded it was a cause of human lung cancer.
Q Has any Surgeon General's Report concluded otherwise since then?
A No.
Q Next one, please. The National Research Council. First, what is that?
A The National Research Council is part of the National Academy of Sciences, which is the group that represents the scientific community in the United States. They are frequently asked by a variety of governmental entities to review and form an opinion on issues of science. They were asked about the same time as the Surgeon General's Report was done to review all of the evidence on environmental tobacco smoke and reach a conclusion as to whether it caused disease or not. They did that, and they concluded it was a cause of lung cancer.
MR. FURR: Objection, this is

hearsay now.
MR. MOTLEY: This is not hearsay. He's an expert. He can base his opinion on out-of-court statements of other parties.
THE COURT: Overruled.
Q Next one, please. I think it's obvious, but for the record what's the National Institute of Occupational Safety and Health?
A That's the scientific arm for the review of scientific information and conduct of research on occupational illnesses and agents in the workplace that cause illness and disease. They reviewed the evidence and they also concluded that environmental tobacco smoke was a cause of lung cancer.

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Source: http://www.industrydocuments.ucsf.edu/docs/tyxd0001

Q Isn't it a given, Doctor, when you and I, when we discuss environmental tobacco smoke, I'm using secondhand smoke, passive smoke, all the same term?
A They all mean the same thing.
Q Okay. And in your professional opinion, has NIOSH reached a conclusion that ETS causes lung cancer?
A Yes.
Q The next one, please. Just for the record,

I think everyone knows what the American Medical Association is, but would you describe it for the jury.
A The American Medical Association is the national organization of physicians of the United States.
Q And approximately how many doctors belong to that?
A I can't give you an accurate count. My understanding is it's several hundred thousand.
Q And has the journal -- excuse me. Has the American Medical Association gone on record as to whether or not cigarette smoking, secondhand cigarette smoking causes cancer in humans?
A Yes, they have.
Q The next one, please. You've already told us about that. That would be correct to put a checkmark there; correct?
A Absolutely.
Q The next one, please. What is the American Thoracic Society?
A The American Thoracic Society is the professional organization of pulmonary

physicians in the United States. And it has a variety of groups that examine specific topics and form what are called position papers or scientific papers on those topics. They have also concluded that secondhand smoke causes lung cancer.
Q Next one, please. The California Environmental Protection Agency, Office of Environmental Health Hazard Assessments, you had something to do with that, didn't you?
A I helped them in the early stages of that process and attended one of the meetings that they held to review the information. They have completed an update of the science on this, I believe last year, and they also concluded, after reviewing all of the new studies, that secondhand smoke caused lung cancer.
Q And I believe I have a copy of that here. Could you tell me if this is what you're referring to?
A Yes. This is the copy of that report, it reviewed all of the scientific studies in detail.

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Q The next one, please.

A American Cancer Society.
Q Again, for the record, I believe you already said what that is, didn't you?
A It is the voluntary health organization in the United States that is interested in the treatment, prevention, and cure of cancer.
Q All right.
A They've also concluded that secondhand smoke causes lung cancer.
Q When you say they've concluded this, this isn't some poll or survey you've done, is it?
A No, this is completely independent of my input.
Q And they've -- have they published reports and opinions and things like that?
A They have issued a formal position on this, yes.
Q Next one, please. Now, American Lung Association, for the record, what is that?
A That's the voluntary health agency that is interested in the prevention, treatment, and diagnosis of lung disease in the United States.
Q Is that the Christmas Seal people?

A That's correct.
Q And have they issued a formal opinion or report on environmental tobacco smoke and lung cancer?
A Yes, they also have an opinion that secondhand smoke is a cause of lung cancer.
Q Next, please. The American College of Occupational and Environmental Medicine, what is that, sir?
A That's the professional organization of individuals who are interested in occupational health.
Q And that's an organization of doctors?
A Doctors and other scientific individuals.
Q And have they issued a report or opinion with respect to environmental tobacco smoke and lung cancer?
A Yes, they have.
Q And is that checkmark in the correct column?
A It is.
Q Next, please.
What is the American Industrial Hygiene Association?
A That's the organization of the individuals who are industrial hygienists. Those are

people who go into workplaces to look at and measure the amount of contaminants that the workplace -- to solve problems that employers are having and to assess the hazards in a given workplaces.
Q Have they issued an opinion or report as

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I've demonstrated on this chart?
A Yes.
Q Next one, please.
The National Cancer Institute, you have already described for the jury. Have they issued an official opinion or report on environmental tobacco smoke and lung cancer?
A Yes. They also have concluded that secondhand smoke causes lung cancer.
Q Next one, please.
Consumer Product Safety Commission. You told the jury what that organization is. Have they reached a conclusion with respect to secondhand smoke or environmental tobacco smoke and lung cancer?
A Yes, they have.
Q And is that accurately depicted on that chart?
A I believe it is, yes.

Q Next, please.
The American Heart Association, and I think there's a date up there, 1997. Just for the record, what is the American Heart Association?
A American Heart Association is the voluntary health agency that is interested in the diagnosis, treatment, and management of heart disease in the United States.
Q And the next one, please.
The National Association of County and City Health Officials; what is that?
A That's the national organization of those groups that represent your city and council -- city and county employees on a professional level. That's their professional organization, and they represent people who are county administrators, et cetera.
Q And have they reached a similar conclusion as depicted on this chart?
A Yes.
Q Next one, please.
The American Academy of Pediatrics Committee on Environmental Health. That's

an organization of doctors that deal with children, pediatrics?
A That's right.
Q And they have a committee on environmental health?
A Yes.
Q Have they reached the conclusion depicted on that chart?
A They have.
Q All right. The Advisory Committee on Tobacco Policy and Health, is that the Koop/Kessler committee?
A Yes. Yes, it is.
Q Have they reached a similar conclusion?
A They have.

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Q Now, what about the American Cigarette Industry; do you know whether they've reached a conclusion on this?
A They believe that the evidence is not sufficient to conclude that environmental tobacco smoke causes lung cancer.
Q Can you show that, please. So we've checked that correctly?
A That's correct.
MR. MOTLEY: I'd like to mark that

chart.
MR. OHLEMEYER: Can I get a copy of it, please?
MR. MOTLEY: I'll have to make you one. I actually have one.
MR. OHLEMEYER: Thank you.
MR. MOTLEY: May I approach, Your Honor?
THE COURT: Yes. Thank you.
Q Dr. Burns, I'm going to hand you a copy and ask you if that's a copy of what we just demonstrated to the jury.
A Yes, it is.
MR. MOTLEY: I just want to mark it for ID for the record, please. I marked it as No. 44, Mr. Cassell.
MR. CASSELL: I believe it would be 25, sir.
MR. MOTLEY: No. That's right. All right.
Q Now, Dr. Burns, let me go back to the EPA report that we have been discussing, if I might. Can everyone --
MR. MOTLEY: Can Your Honor inquire if the jury can hear okay?

THE COURT: They can.
Q When the EPA, for that matter, any government agency --
MR. MOTLEY: May I stand here, Your Honor?
THE COURT: Go ahead.
Q -- investigates a health matter, okay, do they take evidence, maybe not like this in a courtroom, but do they gather up information from different sources?
A Not every agency does, but the EPA, through its process, has open hearings where it notices the hearings; that is, sends out the notice that they're going to have this meeting to all of the interested parties, and then takes evidence from those interested parties as part of the process by which they reach a judgment.
Q Okay. And in this instance, you participated in this process?
A I did.
Q Did the EPA take evidence, that is, have people come in and express their opinions in regard to their investigation of secondhand

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Source: http://www.tobaccoindustrydocuments.ucsf.edu/docs/tyxd0001

or ETS?

A Yes, there was an extensive set of presentations.
Q Are you familiar with an organization called HBI, or Healthy Buildings International?
A Yes, I am.
Q And how are you familiar with them, sir?
A They were one of the organizations that presented at the EPA hearing on the -- I believe they presented evidence on the magnitude of the problem in work environments, the measurements of the environmental tobacco smoke in the work environments. And my recollection is that the data showed that --

MR. OHLEMEYER: Objection, Your Honor. Calls for hearsay.

THE COURT: I think he's answered the question.

Q I'll come back to them in a little bit, about what the data shows.
A That's fine.
Q Generally, to your knowledge, did the cigarette, American cigarette manufacturers, have an opportunity to be heard with respect to the EPA?

A Oh, yes. They were extensively represented and, again, my recollection is they had approximately half of the time allotted to public presentations.
Q Now, sir, with respect to the Healthy Buildings International, do you have any personal knowledge about whether that organization has any connection with the American cigarette manufacturers?
A It is my understanding that it is heavily sponsored by the American cigarette companies.
Q Doctor, I want to go back now to hospitals, okay? Have you ever worked at a VA hospital?
A Yes. Both in my medical school years and also during the period of time that I was at UCSD. We have a two-hospital now, three-hospital system at UCSD. One of them is a Veteran's Administration hospital, and that's where I was based in the early part of my career.
Q So beginning what year would you have some VA hospital experience? Some work experience, I'm talking about.

A Well, I worked in Boston as a medical student.
Q Year?
A That would be 1972.
Q Okay.
A I was a lecturer at Emory and taught

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physical diagnosis.
Q That's in Atlanta?
A It's in Atlanta. Emory University, during the time I was at CDC.
Q And that was year?
A And that was 1974 through 1976.
Q Okay.
A And I taught physical diagnosis at the Veteran's Hospital there. And then I was a fellow at UCSD and spent half of our clinical time at the Veteran's Hospital from 1976 through '79. I was based at the VA Hospital 1979 and '80 and still am periodically out at the Veteran's Hospital as part of my teaching responsibilities.
Q So from 1980 on it's been less, but you still have some involvement?
A Yes. We have a program that is based in both hospitals, and so it's not uncommon for

us to be in both institutions.
Q All right, sir. In Boston, in 1972, you were in medical school, but what did you do at the VA Hospital? I don't mean give us everything you did.
A I took a cardiology rotation for one month.
Q The heart patients?
A That's right.
Q And in Atlanta from 1974 to 1976 what did you do?
A I taught physical diagnosis, which is to teach medical students how to examine patients and take a medical history.
Q Did you go on that ward, those wards?
A Oh, yes. You actually go with the student to examine the patient.
Q At UCSD from 1976 to present, have you physically been out on the wards?
A Sure.
Q I want you -- you have looked at the case of Mildred Wiley, have you not?
A I have.
Q I want you to just assume for a second that she died in June of 1991. You know that yourself from the death certificate.

A I do, yes.
Q Restricting yourself to those 19 years, sir, can you tell the ladies and gentlemen of the jury and the Court whether or not in your personal experience and observation you observed veterans smoking in hospitals that you had personal experience at?
MR. OHLEMEYER: Objection, Your Honor, relevance; beyond the scope of this witness' testimony.
MR. MOTLEY: Your Honor, it's not -- I'm sorry.
THE COURT: Go ahead.
MR. MOTLEY: I was just going to say, it certainly is relevant. I'm laying a

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predicate and foundation for some testimony I'm going to ask him, and his personal experience is certainly relevant.

MR. OHLEMEYER: May we approach briefly on that?

THE COURT: Let me see the document.

Last objection is overruled. You may continue, Mr. Motley.

MR. MOTLEY: Thank you, Your Honor.

Q First your observations as a physician or a physician in training. Did you observe veterans smoking in Veteran's hospitals?

A Oh, yes. It was very common practice. In general, veterans smoked more heavily than the general population.

MR. OHLEMEYER: Objection.

MR. MOTLEY: I didn't ask you that yet.

THE COURT: The last as to veterans will go out. It's not responsive.

Q You did observe veterans smoking?

A Yes.

Q In your experience, and in your education and training, do veterans smoke more often or less often than members of the non-veteran general population?

MR. OHLEMEYER: Same objection, Your Honor.

THE COURT: Objection is noted and overruled.

You may answer, Doctor.

A They smoke more commonly than the general population, particularly the general hospital population.

Q By a magnitude of two or what? Give us a reference here.

A It's about half again as much as the general population.

Q Half again more?

A Half again more.

Q Now, Doctor, are you familiar with something called the accreditation, I guess it's accreditation. How do you pronounce that?

A Accreditation.

Q Accreditation manual for hospitals promulgated by the Joint Commission on Accreditation for Hospitals?

A Yes, I am.

Q Are you familiar with -- well, what do they do? What's their purpose?

A Their purpose is to review and accredit hospitals and all patient environments for the compliance with the standards that they set. It's intended to maintain the quality of those institutions relative to the standards that they have.

Q Have you ever had experience with -- can I call it the JCAH?

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Source: https://www.industrydocuments.ucsf.edu/docs/tyxd0001

A Yes, you can. JCAHO is the current.

Q Have you had experience with them?
A I have. As medical director of respiratory care, I'm responsible for the standards that apply to the respiratory care department, and therefore I do have a substantial interaction with that group and am familiar with the process.
Q Are you then personally familiar by education, training, and experience with the JCAH manuals and requirements for hospitals?
A Yes.
Q Can you tell me, sir, prior to 1991, were there any such regulations by the Joint Commission on Accreditation for Hospitals, prior to 1991, with respect to environmental tobacco smoke with respect to the amount of smoke permitted?
MR. OHLEMEYER: Objection, Your Honor. Lack of foundation, beyond the scope of the witness' previous disclosure.
THE COURT: Overruled. You may answer.
A Prior to that time, there was no JCAH standard for environmental tobacco smoke exposure.

Q Were those accreditation manuals that you mentioned standard policy for hospitals across the United States from, say, 1972 to 1991?
A Yes, they were.
Q Were there any standards, sir, like by the JCA, you say, HO now?
A Uh-huh. Yes.
Q Were there any standards that said you were in violation of your accreditation if there was four cigarettes being smoked in one room or anything like that?
A No. There were -- the standard is a measure that they use to evaluate the institution. And there was no measure that said this is the number of cigarettes that are allowed to be smoked.
Q Doctor, would you define for the record that word.
A Synergism is a term that is applied when you get more of an effect than you would expect from the sum of the two independent effects. So if you get a certain amount of risk, say, from cigarette smoking, if you get a risk of ten from cigarette smoking, and say

asbestos, you get a risk of five from asbestos exposure; if you add those two exposures together, you would expect the risk of 15.
If you get a risk much higher than that, then the combined exposure produces

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more disease than the sum of the independent exposures. And we call that synergism, or synergy, depending on how you want to use the term.

And in actual fact, the numbers for asbestos show 50. So you have a risk of 50 with a combined exposure, whereas the sum of the two independent exposures would give you a risk of 15. So it's much higher than you would expect just from adding the two together.

What it implies --

MR. OHLEMEYER: Excuse me, Your Honor.

THE COURT: I think you answered the question, Doctor.

MR. MOTLEY: I'm sorry, I was trying to find out if we had a book here.

Q Did the Surgeon General of the United States

study this at a given point in time?

A It's been studied in several of the reports. The most detailed discussion of it was in this one, which is Cancer and Chronic Lung Disease in the Workplace.

Q I thought it was up here. That's what I was trying to find. This is 1985. Did you have anything to do with this?

A Yes, I was the senior scientific editor for that volume, and I also authored the chapter on asbestos and played a substantive authoring role in several other chapters.

Q So you have expertise on asbestos and cigarettes working together?

A I do.

Q All right. Doctor, is there something called asbestosis?

A Yes, there is.

Q That's asbestos with an I-S on it; correct?

A That's right.

Q Define asbestosis for the jury, if you don't mind.

A Asbestosis is a process by which the lung is scarred following sustained inhalation of asbestos fibers. Asbestos is a dust that

has a long thin fiber. You inhale it into the lung and it sticks in the lung. And after a prolonged inhalation, after a sustained amount of inhalation, when you get enough for a long enough period of time, it causes scarring of the lung and it's a particularly distinctive type of scarring.

Q Now, in fact, Doctor, the first time you and I ever met was in a courtroom where you were testifying against me, against my client; isn't that right?

A I believe that's true.

Q Okay. And you looked at Mildred Wiley's case, did you not, for us?

A I did.

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Q For the family?
A Yes.
Q And can you tell the ladies and gentlemen of the jury whether Mildred Wiley had in her lungs scars caused by asbestos -- scars caused by asbestos such as it would be called asbestosis?
A No. She had no evidence of asbestosis in her lung. There was no evidence of asbestos bodies. The microscope -- you look under a

microscope, and you can see these residuals of asbestos. None of those were present and there was no scarring consistent with asbestosis.
Q So, Doctor, did you see -- you looked at the x-rays and other things in this case?
A I just looked at the reports, not at the x-rays myself.
Q Did you see any reports that would indicate there was any asbestos scars in this lady's lung?
A No, neither the x-ray reports nor the autopsy described any scarring in her lung consistent with asbestosis.
Q In addition, Doctor, to --
MR. MOTLEY: Your Honor, you've already admitted this document. There's a limiting instruction. May I hand it to Your Honor?
THE COURT: All right.
MR. OHLEMEYER: Your Honor, again, I object to any use or the eliciting of any opinions from this witness on these documents, because they're not the subject of his previously disclosed testimony.

MR. MOTLEY: Your Honor, they certainly are. We disclosed -- we already argued this one.
THE COURT: What document do you have?
MR. MOTLEY: I'm sorry, sir. We argued this once.
THE COURT: These are both admitted.
MR. MOTLEY: Yes.
THE COURT: 9645. Go ahead, Counselor. Objection is overruled.
MR. MOTLEY: May I have Mr. Cassell give these to the jury, Your Honor?
THE COURT: All right.
Q Doctor, did I give you a copy?
A No.
Q Doctor, you notice this is dated March the 7th, 1968?
A Yes, that's correct.
Q And actually held this meeting in Hilton Head. You know where that is, don't you?
A I do. I've never been fortunate enough to visit there. I do know where it's at. It's

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in North Carolina.

Q No, it's not. South Carolina.
A South Carolina? I don't know where it is then. Sorry about that.
Q Everybody gives North Carolina credit.
MR. FURR: We wish it was there.
MR. MOTLEY: I imagine you wish I was there.
Q Now, Doctor, this was -- I ask you to assume that Dr. Wakeham was the medical -- excuse me, was the head of R & D for Philip Morris; okay?
A I know that independently.
Q You know that independently.
Look on the first page, please. It says, "When the smoking and health question became critical in the 1950s, the tobacco industry took two steps to meet the situation.
"First, it adopted the, quote, vigorous denial approach, the statistical evidence is biased, nothing is proven, animal experiments don't tell us what happens in humans."
Did I read that correctly?
A Yes, you did.

Q All right. This is 30 years ago, almost to this day.
A That's correct.
Q All right. Let me ask you this question, sir: Based on your personal knowledge and your involvement with the EPA report in 1993, has the cigarette industry -- and this is in regard to people who smoke cigarettes, correct, this document right here?
A That's correct.
Q It's about people who smoke and get cancer; correct?
A That's correct.
Q All right. Now, in regard to people who are exposed to environmental tobacco smoke and get cancer, is it your experience that the position of the cigarette industry in 1993 in the EPA report process was vigorous denial?
A That's correct.
MR. OHLEMEYER: Excuse me, Your Honor. I object to Mr. Motley's questions being argumentative. I object to the question calling for an opinion from this witness. It isn't subject matter of his

expertise or his stated qualification.
MR. MOTLEY: I asked him from his personal experience. He was there.
MR. WAGNER: And no foundation.
MR. MOTLEY: Judge, he said he was part --

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THE COURT: Objections are overruled.
Q Was it your experience that their position was vigorous denial?
A Yes. They were quite vigorous.
MR. OHLEMEYER: Excuse me, Your Honor. He's answered the question.
Q Just yes or no. Vigorous denial, yes or no?
A Yes.
Q Was their position about secondhand smoke and whether the statistical evidence is biased, was that their position?
A That was also their position.
Q And was their position that -- was their position that nothing is proven?
A That was also their position.
Q And was it their position that animal experiments don't tell us what happens in humans?

A Yes.
Q Let's turn to the case of Mildred Wiley, if I might, Doctor.
THE COURT: Would you hand those down.
Q First of all, Doctor, can you tell us just generally the nature of the things that you looked at in Mildred Wiley's case.
A I looked at her medical records, I looked at the results of her autopsy, looked at affidavits describing her work environment, and some of the legal case documents.
Q Wait a minute. I missed something. You said medical records?
A Medical records, affidavits, her autopsy report, reports from other physicians describing her care.
Q Dr. Turner, was that a name you remember?
A Yes.
Q Dr. Songer?
A Yes.
Q You looked at their reports?
A I did.
Q And I may not be spelling his name right. Anything else? I'm not going to write

all the doctors' names up there.
A And then there were some documents related to some litigation.
MR. MOTLEY: Again, speak into this direction, okay.
Q I forgot to ask you one thing about synergism. I apologize. The jury has heard there's something called radon gas. Are you familiar with that?
A Yes.
Q Have you personally studied that as a health physician?
A Yes. One of the chapters in this report was on the effects of radon gas.
Q Okay. Now, this report being?

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A The --
Q The one you were editor of?
A Cancer and Chronic Lung Disease in the Workplace, yes.
Q There's actually a chapter in there about radon?
A There is.
Q Back to that word "synergism." Is there a synergism, in your opinion, between radon exposure and cigarette smoke?

A Yes, there is. And the synergism was characterized slightly differently in that it appears to be predominantly an accelerating effect. That is, the effect is much more prominent early in the life experience of the individual rather than at the very end of the life. And so you get both more disease than you would expect, and the disease occurs earlier than you would expect.
Q So radon is an accelerant in that regard, in connection with cigarette smoke?
A It is an independent cause of lung cancer and it also, in combination with cigarette smoke, produces more lung cancer than you would expect from the sum of the two exposures, and that cancer occurs earlier than you would expect it to occur.
Q What is the typical age of people in the United States who contract lung cancer?
A The typical age is usually late 60s.
Q Late 60s. From the records you know Mildred Wiley died at age 56.
A That's right.
Q I've already tried my hand at spelling this.

I failed, but --
A We demonstrated I don't do any better than you do, so...
Q With my pad -- I hope, if the queen will forgive me for not being able to spell her language. Would you explain for the record what cumulative dose means in connection with cigarette smoke diseases?
A Obviously there are two measures of dose. One is how much you are exposed to at any moment in time, and the other measure is how long you've been exposed to it. With cigarettes, that's been described as pack years; the number of packs you smoke per day times the number of years you've been smoking.

For other occupational exposures it may be the numbers of fibers of asbestos in the air times the number of years you've been exposed to that, or the amount of radiation in the air times the number of years you've been -- number of months, actually, in that setting, that you've been exposed.

Q If someone was exposed over a 30-year period

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of time, let's say to asbestos, and got lung

cancer from asbestos, could you identify which exposure caused it or did they all contribute?

A In general, we feel biologically that they all contribute.

MR. MOTLEY: Your Honor, may I have permission to do a little scientific demonstration for the jury?

THE COURT: Go ahead.

Q Would you come down, Doctor.

A Sure.

MR. MOTLEY: This is about as far as my science goes, too, Judge.

Let me get you this microphone.

THE WITNESS: I haven't a clue as to what he's going to do.

MR. MOTLEY: That's good. I don't either.

Q All right. I got a glass here, depending on your perspective of life, is either half full or half empty. All right? I'm going to fill this up. It's already got water in it, and I'm going to go like this. And now just a little bit, pour it in a glass, run over just a little bit, okay? See it's

overflowing now?

A Yeah.

Q Which drop of water caused that glass to overflow?

A We can't define that. I mean, we think of things in terms of the last straw that breaks the camel's back, but obviously it's the entire weight that's on the camel's back, not the last straw that was placed there.

Q Every drop of water caused it to flow over?

A That's correct. Did I get that right, that scientific demonstration?

Q Well, I got a wet sleeve out of it. Thank you, Doctor.

Doctor, in regard to Ms. Mildred Wiley, based on your review of all the evidence in her case, can you tell the ladies and gentlemen of the jury the cause of her death?

A Yes, she died of lung cancer, lung cancer caused by environmental tobacco smoke exposure.

Q Can you tell the ladies and gentlemen of the jury, like my little scientific experiment,

whether the summation or the total of all of her exposures contributed as a substantial contributing factor to the lung cancer you diagnosed?

MR. OHLEMEYER: May we approach for the purpose of an objection, Your Honor?

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THE COURT: All right.
(Bench discussion)
THE COURT: Last objection overruled.
Now, Mr. Motley, if you would state the question again.
MR. MOTLEY: I fear I won't be able to, Your Honor. If I might ask the good lady to repeat the last question I posed to the witness and listen carefully, please.
(The requested material was read by the reporter.)

A Yes, they do. And it means --

Q Now, you answered the question.

A Yes.

Q Now, let me ask you why you reached that opinion.

A The people tend to think of lung cancer as being hit by lightening because it -- they

perceive it as when the diagnosis is made, when they're told by their physician that they've got lung cancer. But the process of developing lung cancer isn't a one-time step. It's not a one-step process.
What happens is very slowly over time, gradually, there are changes in the DNA, the controlling structure of the cell, that slowly occur. You get one change, and then that cell continues to divide, and then there's another change in that cell. It now has two changes.
And you get several changes that occur slowly over time until finally the cell loses its normal characteristics of stopping its growth and not invading, and gains the characteristics of a cancer, which are that it grows in an unregulated way and invades the tissue around it.
So this is a slow process that occurs over time and requires a sequential exposure to carcinogens throughout that period of time in order to complete the process of carcinogenesis or formation of the cancer.
So the only exposures that would not

have contributed to Mrs. Wiley's lung cancer would be the ones that she received after she actually had the lung cancer.

Q Doctor, in general, in American society today, is lung cancer a rare occurrence? That is, is it a rare -- let me rephrase that.
Is it a rare form of cancer?

A No. Unfortunately, lung cancer is now the most common cause of cancer death in both men and women.

Q And can you give us an approximation of how many lung cancer deaths occur each and every year in America?

A There are about 150,000 lung cancer deaths

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each year.
Q Now, have you, sir, in the course of your training and your experience, what you've done with the Surgeon General, come to study somewhat the rates of lung cancer in this century in the United States?
A Absolutely. It's one of the critical issues that we've examined.
Q And why has it been important for you to examine the occurrence or the number of

cases of lung cancer in the 20th Century in America?
A Because one of the early issues that raised the question of cigarette smoking causing lung cancer was the fact that lung cancer rates were increasing very dramatically during this century, and that led to the correct perception that we had an epidemic of lung cancer and there began to search for the cause of that epidemic of lung cancer.
Q I have displayed on the screen here -- are you familiar with that, or something similar to that, that graphic we just displayed?
A Yes, I am.
Q Doctor, if you don't mind, come down. Let me ask you this: Does this fairly and accurately depict part of the basis of your opinion?
A Yes, it does.
Q And if you'll stand right there. And remember the lady right beside you has to that take this down, the Court and jury have to hear you, Counsel does. Tell us the significance of this chart.
A This is a chart that looks at lung cancer

death rates per hundred thousand people. That's the standard way of examining the frequency with which people die of given diseases.
That is averaged over the population. And this is from 1950 through 1992 or 3.
What you can see --
Q Guess what Mr. Howard had.
A Oh, good. What you can see is that lung cancer death rates in white males have climbed substantially from 1950 peaking in the late 1980s and have begun to decline. Lung cancer death rates in black males, which in the 1950s were below those for white males, have now increased to well above those for white males.
And rates in women, which had been relatively low prior to the 1960s, have begun to increase dramatically, with no real difference between black and white women.
Q Doctor, has it sometimes been said that epidemiologists are medical detectives?
A That's correct. They are commonly called that.

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Q Medical detectives. By training and

experience and work with the Surgeon General, are you an epidemiologist?
A Yes.
Q Have you yourself personally investigated what's caused this dramatic lung cancer change in incidence in the United States?
A Yes, I have.
Q I'm asking about you. Have you?
A Yes. Yes, I have. All of the work we do tends to be with several individuals, but yes.
Q You don't claim to be the author of all of those pages over there.
A No.
Q Okay. Can you tell me, to a reasonable degree of scientific certainty, what the cause -- the leading cause of those numbers shown on that graph are in your opinion in the United States? What's been the reason for this dramatic increase? You would call that a dramatic increase, wouldn't you?
A I would call it a dramatic increase, and if we go back further, it's even more dramatic.
Q What is the leading cause of that in the United States?

A The overwhelmingly largest cause of lung cancer death is cigarette smoking.
Q Thank you. You may return.
Is there anything on there that you think would be constructive or have we covered it?
A No. Just if you go back further, the rates drop even much lower.
Q Back further meaning the turn of the century?
A At the turn of the century lung cancer could be accurately described as a rare disease.
Q It was rare at the turn of the century?
A That's correct.
MR. MOTLEY: Your Honor, I'm about to embark on another area, and as you recall, we didn't quite get done this morning with our notebook full of things we were looking at. And I wonder if it might be, particularly since the doctor is not feeling well, if we could take that time up doing that.
THE COURT: I think we will send the jury home at this point. We've had a good day. We've got a lot done today.

Ladies and gentlemen, I discussed the matter with the lawyers regarding tomorrow afternoon. I realize, well realize, you have things to do, errands and things of that nature, business things. We're going to knock off tomorrow about 4:00, maybe even

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a little bit before, so you can maybe plan your day a little bit better.

(Standard admonition).

I will see you tomorrow morning at 8:30.

MR. CASSELL: All rise.

THE COURT: Doctor, you may step down.

THE WITNESS: Thank you, sir.

THE COURT: Thank you.

MR. MOTLEY: May the doctor be excused?

THE COURT: I just did.

MR. MOTLEY: I'm sorry. I meant to go back to the hotel.

THE COURT: Yes. Absolutely.

MR. MOTLEY: Your Honor, may I approach for a moment?

THE COURT: Sure.

MR. MOTLEY: Before I do that, may I consult with my colleagues?

(A discussion was held off the record.)

MR. MOTLEY: Judge, I just want to say, this puts me in an embarrassing position. I overlooked this. You know, I hate to keep bringing this up but it's an important document, 33608. One of the recipients of the document is none other than Mr. Furr, who is counsel.

THE COURT: I saw that.

MR. MOTLEY: Oh, you did? Well, I mean, you know, I'm sitting here being told that they don't know who Bob is, and they don't know who Sam is, and I think --

THE COURT: No. Actually I'm the one that said that. And what I said was that we need some evidence as to who Bob and Sam might be here. And if there is evidence in the record already, some of your attorneys can show me.

But other than that, that's what I said. And I did notice that he was on the distribution list.

MR. MOTLEY: Well, let me say, Your

Honor, I misspoke. I said it was Bob Kloepfer, but I have now learned it was Bob Lewis. And it is Sam Chilcoate who was president of the institute. I now have minutes from 1991.

All I'm saying is, Judge, you know, this is going to be a long trial and I just -- and I'm not casting any aspersions, but it just seems to me as an officer of the Court, we ought not to play games about who Bob and Sam are and make me jump through those hoops and make me go take depositions. Well, I know and I think Mr. Furr knows well who they are. Maybe he doesn't. But since I have the minutes from 1991, Your Honor, of

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the -- I don't mean to embarrass Mr. Furr. He's been very nice to me. And I know what I'm saying doesn't embarrass him. But when -- let me finish.

MR. OHLEMEYER: We can short circuit this.

THE COURT: Go ahead.

MR. OHLEMEYER: The fact that Bob and Sam can be identified still doesn't tell us whether Bob thinks that anybody agrees

with this or whether this was Sam's idea that Bob said was silly or whether -- I mean, that's the point. There's got to be more to this than just saying, well, I know who Bob is.

THE COURT: You're telling me now you're stipulating to who Bob and Sam might be?

MR. OHLEMEYER: No, I don't know who Sam and Bob might be.

MR. MOTLEY: Here's Mr. Furr. Here's the minutes that demonstrate the same Mr. Johnson who was at this meeting in 1991 with guess who, Sam Chilcoate Jr., the president of the institute, Robert J. Lewis. And they're talking about the Veteran's Administration, Judge. I don't mean to be --

THE COURT: Mr. Furr.

MR. FURR: Sure, Judge. I don't know who Bob and Sam are. I've never represented the Tobacco Institute, and I didn't then. I don't now. I had been out of law school for a year when that document may or may not have been routed to me. I

have no independent recollection of it. And I can't help authenticate that document.

MR. MOTLEY: Well --

THE COURT: I'm not asking you to at this point. Only thing I said, Mr. Motley, was is there evidence in the record that tells me who Bob and Sam are?

MR. MOTLEY: Well, I move to admit these executive committee minutes, Your Honor, 24389, and I think that demonstrates who Bob -- it's got all three names on there: James Johnson, Robert Lewis, and Sam Chilcoate. Kurt Milgram is also mentioned. They're all in those minutes. Those are all produced, Your Honor, these are produced by Liggett, to which there was no objection by them. I don't think they object to the authenticity.

THE COURT: Any objection to -- is this marked?

MR. MOTLEY: Not yet, Your Honor, I was just providing it.

MR. CASTLE: 26.

THE COURT: Plaintiffs' 26 would be

http://legacy.library.ucsf.edu/tid/axt05a00/pdf
Source: https://www.industrydocuments.ucsf.edu/docs/tyxd0001

the minutes of the meeting of the executive

committee. Any objection to that?
MR. SHOCKLEY: Who are they offering it against, Your Honor?
MR. MOTLEY: Tobacco Institute only.
THE COURT: Tobacco Institute only.
MR. OHLEMEYER: Objection on the basis of relevance, Your Honor.
THE COURT: Any other objection?
MR. OHLEMEYER: Well, I think under Rule 403, this is confusing, prejudicial, and time consuming. And I also think it seeks to introduce evidence of a constitutionally protected lobbying activity that has no relevance at this point to the issues in this case.
There is no doubt that veterans smoke, and there is no dispute in this case that there were rules and procedures that may or may not have been followed about where and whether veterans can smoke. The fact that there were groups of veterans who didn't like those rules really doesn't seem to be relevant. The fact that there were people selling cigarettes who didn't like those

rules doesn't seem to be relevant.
MR. MOTLEY: Should I respond?
THE COURT: 26 will be admitted.
(Plaintiffs' Exhibit(s) 26 received in evidence.)
MR. MOTLEY: Your Honor, based on 26 being admitted, I now move again the admission of the antecedent document, No. 33608, against the Tobacco Institute and RJ Reynolds at this time. I restrict it to them at this time because Mr. Johnson was the chairman of RJ Reynolds. I'd love to hear them deny that.
THE COURT: Any objection now to 33608?
MR. OHLEMEYER: Same objection.
THE COURT: Same objection. Objection is noted.
MR. OHLEMEYER: I'd ask a limiting instruction that I hand the Court to be read in connection with any publication of this document.
MR. MOTLEY: May I have a moment to look at this, Your Honor?
THE COURT: Certainly.

MR. WAGNER: Of course, we have the same objections to this briefing of James W. Johnson document that we had before. I mean, for all the reasons we've articulated before, it's objectionable.
THE COURT: 33608 is offered

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against Tobacco Institute.
(Plaintiffs' Exhibit(s) 33608 received in evidence.)
MR. MOTLEY: And Reynolds.
THE COURT: And RJ Reynolds. And it will be admitted.
MR. MOTLEY: Your Honor, my only objection to the limiting instruction is the last paragraph which states, "Noerr-Pennington." Noerr-Pennington, Your Honor, is a constitutional advocacy, First Amendment right to petition the government, and all the supreme court held in those cases is you can't base a claim.
So I don't have any objection to the first full paragraph which says we can't base a claim, but that doesn't mean that evidence of such activity cannot be the basis of another claim.

What this limiting instruction seeks to do is say, well, ladies and gentlemen of the jury, you can read this and be amused by it, but it doesn't mean anything. And that's not what a Noerr-Pennington says, Your Honor. It's certainly not what you just ruled in admitting this document. So I don't object to the first paragraph, but I do the second.
MR. OHLEMEYER: Your Honor, I think the second paragraph is essentially the point, which is you can't take this evidence and then say because these people engaged in this activity, I'm going to use it as a basis for imposing liability.
MR. MOTLEY: No, sir. It's a difference. I'm not imposing liability for the advocacy, Your Honor, but it can be used as evidence of another claim. The other claim here, Your Honor, is a product claim under Indiana law and a claim for punitive damages under Indiana law.
We're not asking them to be punished for their right to petition the government. And that's -- the last sentence is what I

object to, because that is a misstatement and a corruption of Noerr-Pennington.
MR. OHLEMEYER: Your Honor, what you just heard is exactly the problem.
THE COURT: No, I don't think -- the statement is a fair statement. I will read that limiting instruction when the jury is provided 33608.
Any other matters to come before the Court this evening, Counsel?
MR. MOTLEY: Actually, Judge, I'm about to fall down on my feet as I suppose everybody else is. We don't have anything else right now.
THE COURT: All right. We are in

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recess until tomorrow morning at 8:30.
One other thing, Counsel, before we leave. I don't know how this happened, we had a file stamp up here that certain pleadings have been used, or have been file stamped with that file stamp. I noticed yesterday some of the dates on those file stamped pleadings may have read '97. I don't know how that got changed, but if that happens and if this happened with any

particular pleading, we have corrected the ones in the Court file, in the process right now.
If you have a pleading that bears a file stamped year of '97, the court reporter will correct that with her initials. So it may or may not have any import at this time but I just thought I'd tell you.
Thank you, Counsel.
(The proceedings were adjourned at 5:30 p.m., to be reconvened on February 20, 1998, at 8:30 a.m.)

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